

The Politics of Change: Explaining Capital Punishment Reform in
China

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Abstract

The thesis seeks to enhance understanding of the recent reform of capital punishment law, policies and institutions in China by studying its causes, significance, and limits. The research surveys the reform initiated by China's top judiciary – the Supreme People's Court - around 2006-2007. It demonstrates a changing domestic socio-political context, within which the external and internal impetus to reform is inevitable. Drawn from elite interview evidence with penal policy makers including judges, prosecutors, and legislators, the thesis concludes that Europe-inspired, cross-border abolitionist sentiments created motivation for change in China through soft mechanisms of shaming and persuasion, albeit to a limited degree. In the domestic realm, the research identified three pairs of interrelated tensions – the contradiction between elites and the public, the conflict between political intervention and judicial autonomy, and the divergent interests and priorities between top judicial organs and lower courts. These tensions are useful social, political and legal indicators to explain why and how China reformed its capital punishment machinery.

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List of Abbreviations

ACHR	American Convention on Human Rights
ACrHPR	African Charter on Human and Peoples' Rights
CCP	Chinese Communist Party/ Communist Party of China
CPCGQ	Current Penal Code of Great Qing
ECHRb	European Convention on Human Rights
ECOSOC	United Nations Economic and Social Council
EU	European Union
HPC	Higher-Level People's Courts/Provincial-Level People's Courts
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
LACSCNPC	Legislative Affairs Commission of the Standing Committee of the National People's Congress
MFN	Most Favoured Nation
NGO	Non-Governmental Organizations
NPC	National People's Congress
NPCGQ	New Penal Code of the Great Qing
PRC	People's Republic of China
RMB	Renminbi, Chinese currency
SCNPC	Standing Committee of National People's Congress
SPC	Supreme People's Court
SPP	Supreme People's Procuratorate

UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCHR	United Nations Commission on Human Rights

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Introduction

Purpose of the Current Study

Inspired by the worldwide campaign against the death penalty spearheaded by European countries, the reforms of capital punishment law and policies in the People's Republic of China (hereinafter PRC or China) in recent years have caught the attention of the global media. These reform initiatives, launched around 2006-2007 by Chinese political and legal authorities, signified a cautious and incremental attitudinal shift away from previously excessive punitive capital punishment policies. Compared to the extensive literature on the use of the death penalty in retentionist jurisdictions such as the United States, research on Asian capital punishment law and practices in general (Johnson and Zimring, 2009: 91) and especially China (Oberwittler and Qi, 2009: 4) is relatively thin. In particular, there has been little theoretical or empirical work focusing on the legal and institutional changes that have been made in China in recent years.

This study pays close attention to this subject from a variety of perspectives. It seeks to explain the causes, to assess the significance, and to suggest the limits to a series of capital punishment reform measures. By studying the changes to law, practices and institutions with regard to capital punishment in recent years, this thesis endeavours to explain or further clarify several questions left unanswered by existing research.

One of the central questions this thesis answers is: what are the causes of China's capital punishment reforms? It has been argued that the most proximate cause for the reforms is a series of high-profile capital cases involving miscarriages of justice, which had been widely reported by the Chinese media before the reforms were launched. The suffering of capital offenders in these cases aroused significant public dissatisfaction, which may have triggered the reform movement. However, this was arguably an insufficient condition for changes in law and practices on such a scale. In this thesis, I demonstrate that reform was the product of deeper and shifting international, social, political and legal conditions that whirl around the administration of criminal justice in China. In the words of one of my interviewees, the reform was not 'a sudden impulse', or a quick response to 'a handful of erroneous adjudications and executions in capital cases exposed by the Chinese media'. Rather, it was promoted by 'profound social and political changes that took place in China since the latter half of the 20th century'.

In order to identify these complex and sometimes interactive motivating factors, the thesis sets the reforms within an historical time frame. Do the influences on the reforms stem from pre-Communist China, or are they entirely traceable to the institutions, ideology, and dynamics of contemporary state and society? An overall survey of the imperial and republican capital punishment law and practices therefore seems pertinent to assess whether contemporary reform of capital punishment bears the imprints of imperial and republican historical traditions, although it is unlikely that either the pre-reform excessive capital punishment policies or the reforms aimed at scaling down the use of capital punishment are solely and directly determined by historical factors.

In any event, it is necessary to carefully examine the shifting patterns in the PRC's use of capital punishment, in law and in practice, in the modern context. This is the immediate context of capital punishment reform in the following discussion. To this end, the thesis examines different stages in the development of capital punishment law and institutions over a span of approximately six decades on both international and domestic levels. Scobell (1990: 503) has observed that capital punishment was a 'permanent fixture' in the Chinese criminal justice system. Indeed, even during the first three decades, when in general Mao Zedong rejected the use of legal institutions and legal norms to govern the country, capital punishment remained a fundamental instrument of political governance. During the 'lawless' (Leng and Chiu, 1985: 85) Maoist era, when the 'rule of man' took predominance over the 'rule of law' and when the legal system was demolished, capital punishment was further politicized and sustained. From Deng (late 1970s-1980s) to Jiang (1990s-early 2000s), comprehensive legal reforms in China resulted in an enormous volume of legislation and a wide range of legal institutions (Lubman, 1999: 3) while capital punishment has been further entrenched through the periodical 'Strike Hard (yanda) Campaigns' (Tanner, 1999). Most recently, the Hu-Wen administration (2003-2013) saw no bold changes in the field of law despite the high-profile reforms of the law, policies, and institutions with respect to capital punishment.

So, what makes capital punishment so special that as a fundamental penal phenomenon throughout Chinese penal history? What practical or symbolic functions capital punishment serves during each of these stages? What is its significance with regards to political and social governance? What are the politics

surrounding its use and discourses? In relation to the post-*Furman* U.S. Supreme Court jurisprudence that death is qualitatively different from all other forms of penal sanctions due to its irrevocability, severity, and ethical-relevance (Abramson, 2004-2005), does the death penalty have significantly singular meaning in the setting of China, in comparison with other forms of penal punishment? These are important questions to be answered before investigating the causes of China's capital punishment reforms.

On the international or transnational level, the key question to ask is: has the recent reform been inspired by international influences? Certainly there is reason to assume so: the two periods of reform in Chinese history to date, with regards to capital punishment, both occurred at a time when China was subject to significant international influences. The first period was late Qing, featuring the abolition of *Lingchi* and other forms of cruel, inhuman execution methods. The changes to the administration of capital punishment, accompanied by the unprecedented transformation of many aspects of the imperial legal system, happened when the defeated Qing Empire was subject to a stream of powerful Western colonial influences. The second era of reform in history, the most recent one, occurred when China's practices in the field of human rights and capital punishment garnered closer attention from the international community and when China's use of capital punishment became a regular topic in Sino-European diplomatic dialogues and academic communication.

As the global movement against the death penalty is closely tied to the dissemination of human rights norms and jurisprudence, it is therefore meaningful to survey the ‘translocal’ diffusion of the values, norms and rhetoric of human rights from the West to China, a country geographically remote, culturally different and politically distinct and observe the ‘resonance of human right appeals in non-Western setting’ (Johnson and Zimring, 2009: 9). The obvious question in regard of this context is whether and how the European-inspired ‘international human rights dynamic’ (Hood and Hoyle, 2009) calling for abolition of capital punishment shaped the law, ideology and institutional arrangements with respect to the death penalty in China. In other words, whether and to what extent have the powerful anti-death penalty sentiments and influences from Europe and beyond promoted reform in China?

In the domestic realm, a question left unanswered is: are there any deeper motivations, be they political, juridical or social, that inspired the authoritarian regime to limit its power to punish with the ultimate sanction? If so, what are these factors? The reform of capital punishment machinery arose in the existing institutional and legal environment. How does China’s increasingly fragmented politico-legal authority during its reform-and-open era exert influences on the reform processes? Changes in norms and institutions shape – and are shaped by – the perceptions and values of the members within a given society. So how have capital punishment reforms been both influenced by and responded to by the perspectives, attitudes and demands of elites and the general public in China?

These questions merit particularly careful analysis given the apparent paradox between the centrality of capital punishment in the exercise of penal power in China

and the apparent willingness of the Chinese politico-legal authorities to, at least conditionally and progressively, constraint its power to punish with the ultimate sanction. Indeed, capital punishment has been a central part of the Chinese criminal justice regime since its inception and has served important functions of crime control and deterrence during China's transition towards a market economy since the late 1970s. On the other hand, the recent voluntary, top-down reform launched by China's top judiciary and sponsored by the Party-state appears to suggest that authoritarian political control does not contradict a movement towards gradual restriction and final abolition of the death penalty. How should we interpret this seemingly paradoxical situation? Does it have something to do with the fact that China is home to a vast array of complex and often conflicting ideas, values, forces, interests and sentiments? Could these factors be relevant to our discussion on the recent changes in China's death penalty policies? Is the Chinese reform an outcome of competing factors and forces?

Presumably, the voluntary reconfiguration of the capital punishment machinery, as well as the repercussion of this adjustment on the entire criminal justice regime, would not be significantly detrimental to the political control and governance, which are the utmost priorities of an authoritarian government such as China. Or even, the partial modification of capital punishment apparatus and the conditional curtailment of the use of capital punishment may help the Party-state to augment its control over the population, or to adapt its governance to new perspectives, sentiments and attitudes in a fast-changing society.

This leads to the second key question of the thesis – the appraisal of the significance of the recent capital punishment reform. As Johnson and Zimring (2009: 9) have observed, in comparison with pre-abolition jurisdictions where capital punishment was retained in law as merely symbolic gestures, the fact that capital punishment has been central to social and crime control in contemporary China implies that the overhauling of the regime requires significant incentive and. There is an important question to ask here: is the recent reform an important step towards abolition? To what extent does the resilience of the authoritarian governance allow reforms to take effect? Would the Party-state's tight political control over society sanction an incremental, step-by-step reform schedule aimed at restriction and even eventual abolition of capital punishment in China?

As Lubman (1999: 2) has observed, many constraints on China's legal reforms, which started in the late 1970s, can be traced back to 'the ideology and organization of the Chinese Party-state', the hybrid regime of the Chinese Communist Party (hereinafter CCP) entwining with government apparatuses. In the context of capital punishment reform, it is equally significant to ask: what are the limits of the reform? Is the political character of Chinese government the sole factor holding back further reform? If not, what are other forces and factors that constrain the scope and depth of reform? Attempting to describe and explain the limitation of the reform is the third key task of this thesis.

A Review of Selected Literature

The aim of this section is to locate my doctoral project within the widely known academic works in the field. One of the central questions on which this thesis focuses

– why does China reform its death penalty regime – relates to the body of existing literature on the death penalty, which seeks to explain the causes for retention in individual jurisdictions (Garland, 2005; Garland, 2010; Zimring, 2003), in multiple countries (Bae, 2007), on a regional level (Johnson and Zimring, 2009), or worldwide (Greenberg and West, 2008; Neumayer, 2008). How would this doctoral research contribute positively to the previous academic work?

Currently there is no consensus among scholars on the cause for the retention of capital punishment or excessive death penalty policies. This said, most of the existing scholarship on this topic believes political factors are part of the explanation, if not the determinant variables. On the global scale, Neumayer (2008) found that political factors are the major determinants of the global trend towards the abolition of the death penalty, on the basis of a cross-national quantitative analysis. His research defines the term ‘political factor’ broadly to include not only domestic political factors such as the democratic orientation of national governments, democratization process and partisan effects, but also international and intra-national pressures. Yet the author, unable to solve the puzzle of United States and Japan both being advanced democracies and retentionists, admits that ‘only a detailed analysis of the social and political histories of both countries can provide such an explanation’ (Neumayer, 2008: 30).

In a slightly different vein, Greenberg and West (2008) argue that legal, political and religious (the presence of Catholics) factors directly influence the death penalty policies while economic and cultural variables have an indirect impact on the use of capital punishment. Acknowledging political freedom and partisan effects shapes the

death penalty policies in retentionist jurisdictions, they also pointed out that their regression analysis failed to single out the political ideology of a government's executive branch as the sole determinant. In fact, there are important exceptions to these broad generalizations - 'No single characteristic neatly distinguishes between abolitionist and nonabolitionist states.' (Greenberg and West, 2008: 332)

In order to further solve the puzzle, scholars took a relatively in-depth study of the causes for retention or abolition of the death penalty, on a regional level and in multiple jurisdictions. Surveying the shifting death penalty policies in four jurisdictions – Ukraine, South Africa, the United States and South Korea – Sangmin Bae (2007) argued that the feature and structure of domestic political institutions, external pressure imposed upon target states by human rights promoters, or political opportunities to achieve abolition after radical regime changes are the determining forces for abolition or the absence of abolition in these selected jurisdictions.

Johnson and Zimring's thorough and stimulating account of the use of the death penalty within the region of Asia took a step further to narrow down this cohort of 'political' and 'international' variables to one. Refuting that public attitudes influence death penalty policies, the authors explained that the 'political factors', 'which are the only explanation that fits with the variation in executions in Asia' (Johnson and Zimring, 2009: 296), mainly refers to the political orientation of state governments (Johnson and Zimring, 2009: 297-298). Yet this hypothesis generated by an analysis of data collected from the region of Asia could not fully explain the high salience of capital punishment in Japan, which is a full-fledged democracy (Johnson and Zimring, 2009: 325).

Built on these previous academic works, my research with a single focus on China explores the causes for China's most recent death penalty policy changes (since mid-2000s). By examining three pairs of domestic social, penal and political tensions in modern China during three main historical stages of capital punishment policy development, the thesis found that the main determining factor is a continuous effort of the party-state to solidify and improve political governance. In other words, the changing face of the death penalty institutions, law and policies reflects the needs and interests of political authorities in various social and political contexts – to eliminate opposition in the early times after the state making by excessive executions and to buy patronage and legitimacy via responding to public impulses of retribution and revenge in contemporary era. Governing through the death penalty, in its various forms and against shifting social, political and legal environment, has been intermediated through the institutions of popular punitiveness.

In this sense this thesis relates to the argument made by Garland (2005; 2010) and Bae (2007) that a decentralized mode of capital punishment administration and hypersensitivity to populist impulses demanding for executions and revenge by political and judicial authorities are responsible for the retention of capital punishment in the United States. To this effect, a brief comparison between the root causes for retention in China and the United States may found that it is not always the political characteristic or orientation of the ruling government – authoritarian or democracy - that determines the use of the death penalty in a given jurisdiction. Rather, the necessity, willingness and opportunities of the state authorities to

accommodate punitive public impulses may explain the peculiar status of the United States as an outlier to the community of abolitionist democracies.

Does the allocation of penal decision-making power within the penal apparatus allow decision-making processes relating to the death penalty to be insulated from passionate extensive and even direct public engagement? Do the institutional arrangements for the appointment and election of judges provide impetuses to judicial personnel to buy patronage via submitting to populist impulses? Would legal and political elites in the current institutional settings find it harder to embrace human rights norms and values? The answers to all three questions are exactly the same in both China and the US. In line with this reasoning, the responsiveness of political and legal institutions to populist appetite for executions, rather than the political characteristics of ruling governments, is the fundamental causes for retention, and in some cases, aggressive capital punishment policies.

The willingness and ability of states to resist a human-rights-based objection to capital punishment another side of the coin: if the costs of offending public sentiments are minimal and the benefits of obeying abolitionist human rights appeals are considerable, the opportunities of abolishing the death penalty would be grasped by reform-minded political and judicial organs, and *vice versa*. The political orientation of ruling regimes – authoritarianism or democracy and the levels and forms of democratic or authoritarian regimes - may play a role in shaping the cost-benefit calculation in some circumstances *indirectly*.

Now, another main plank of my thesis explores *how*, rather than *why*, the recent reform on the death penalty in China unfolds over time. This part of the thesis builds on the existing literature on the contemporary use of the death penalty (Lu and Miethe, 2007; Johnson and Zimring, 2009: 225-286; Scobell, 1990), and in particular, a new addition to this corpus of existing literature - *The Death Penalty in Contemporary China* by Susan Trevaskes. The focus of Trevaskes' (2012) work is to explain the changes in China's death penalty administration through a textual and semantic analysis of the shifting Chinese death penalty policies from 'kill many' to 'kill fewer' and an examination of the political rhetoric of 'social outcomes' and 'legal outcomes'.

In contrast, apart from explaining how the reform unfolded thematically based on an analysis of data collected from elite interviews with Chinese legal elites, the thesis argues further that the mutually-reinforcing tensions between elites and the public, between the top judiciary and lower courts, between judicial organs and the party-state can be used to explain *how* China reformed its capital punishment regime in the mid-2000s. Specifically, the death penalty reform is initiated by the rising status of judiciary within China's politico-legal bureaucracy since the beginning of the reform-and-open-up era in the late 1970s, the sensitivity of legal authorities to public demands for eradicating prevalent miscarriage of justice in capital trials in the early 2000s, a growing body of legal elites subscribed to the ideals of human rights and due process around the beginning of 2000s, and an increasing downward influence within the judicial hierarchy. As such, the top judiciary utilised the opportunity of recentralizing the review power in capital cases to gain greater autonomy and

authority, yet stopped short of cutting the use of the death penalty to a greater extent with a new turn of public attitudes to punitive in the post-reform era.

Finally, apart from examining and explaining the endogenous and exogenous forces that led to the recent decline in China's use of the death penalty, it is helpful to set the reform in a wider historical context of revolution from ancient times to the contemporary era. Even a cursory examination of the records and texts across the time span can easily find a general trend towards leniency and civilised use of death as the most severe punishment. This historical change on the scale of millennia corresponds with Steven Pinker's observation of the pacification process of violence decline across time and space (Pinker, 2011: xxiv), Durkheim's quantitative law of penal moderation (Durkheim, 1973), and Foucault's account of the demise of cruelty forms of punishment (Foucault, 1995). Even if we shorten the time frame to examine modern China under the rule of the CCP, we can still find a tendency toward restraint and civilised use of the ultimate punishment and growing levels of humanitarianism within the penal regime, subject to interval recoiling and oscillation.

The recent decrease in China's resort to state-sanctioned death is one step in the above-mentioned historical process of penal moderation, yet this change is deeply imbricated within political, institutional and social relations in today's China. Specifically, the policy change expressed a declining importance of executions in reinforcing control and dominance by the ruling regime and a growing need for a better, more effective and less error-prone machinery to serve the instrumental

function as an intermediary symbol between different social classes and groups as well as between the state and its citizens.

In the conclusion chapter of his studies on the origins of the Black Act, E.P. Thompson found himself stood at a 'narrower theoretical ledge' (Thompson, 1990: 260) when he reflects on the deeper meanings of the rule of law within eighteenth century British society. In a similar vein, the overall theoretical vantage point of this thesis is distinguished from the two views adopted by Johnson and Zimring (2009) and Trevaskes (2012).

For one, the thesis disagrees with the claim that capital punishment in contemporary China remains a coercive instrument for killing dissents, enemies, and delinquents by the blood-thirsty political regime. My research shows that the political characteristics of the Chinese government or the propensities of a few political leaders cannot fully explain the changing landscapes of capital punishment law and policies. For another, my explanation is more complex than Trevaskes' (2012) simplistic account that the reform reflects the triumph of the President of the SPC and his reform-minded alliance within China's politico-legal bureaucracy.

I demonstrate that the shifting policies on the death penalty in China express the deep conflicts between different social groups – governing elites and their opponents, reformers and conservatives, and the privileged and the disadvantaged. The use of capital punishment is a social space where all these conflicts reconcile and mediate. The contradictions between legal autonomy and political interference, the contrasting interests of elites and the populace, and the conflicts between the

authority of top-tier legal organs and the needs of grassroots legal institutions translate into changing death penalty landscapes in China. Yet above and behind all of these tensions is the key determining force - the state-society relationship, the political needs to control and govern by respond to populist ethos of revenge and retribution. This is the political logic of the Chinese death penalty reform.

Overview of the Thesis Chapters

Therefore, the thesis aims to enhance understanding of the causes, significance, processes, and limits of the recent changes to capital punishment law, policies and institutions in China. Chapter One briefly surveys the historical roots of capital punishment law and practices in the pre-Communist eras and their implications for the contemporary practices and law-making. In particular, it traces the development of various mechanisms that exemplify the spirits of humanism and leniency in the imperial capital punishment regime, which, arguably, serve as the local and native inspirations for the recent configuration of the contemporary system. These mechanisms include the exemption of certain groups of people from the scope of capital punishment, the sophisticated and refined procedural protection provided for offenders through the assizes system, and the amnesty scheme. Indeed, the research show traces of continuous traditional influences in the current law and practices with regard to capital punishment, including the considerable attention given to the final review procedures, the dualist coexistence of immediate execution and suspended death, the instrumental perspectives that capital punishment is simply one of the means for political governance, and the utilitarian view that it can be used, altered, or

set aside to suit the practical needs at a particular time, etc. This chapter also reviews the influences of both Confucianism and Legalism in shaping the attitudes, perspectives and policies with respect to capital punishment in the imperial time.

In Chapter Two, I first review the institutions and practices in regard to capital punishment in the pre-1949 Communist era, which are the doctrinal starting point at which the Communist politico-legal authorities started to develop its contemporary capital punishment regime. First identified is a particularly fluctuating pattern in the infliction of capital sentences and executions, depending on the external environment and the political needs of the Communist border region regimes. Signs of politicization of capital punishment adjudication and execution, populist impulses, the refusal to acknowledge functional differentiation between legal organs and political authorities at least during some historical periods, and the periodical decentralization of penal power to lower politico-legal organs were all hallmarks of early practices. I then discuss the use of capital punishment in the first two periods of the PRC's penal history – the Maoist era and the Deng-Jiang or 'Strike Hard' era. In the first era, I note two rival models of the administration of criminal justice in principle and capital punishment in particular. That is, the contradiction between the populist, policy-driven, rule of man approach to administer capital punishment endorsed by Mao Zedong and an elitist, professional, rule-by-law approach promoted by his political enemy Liu Shaoqi. For most of the time from the 1950s to the 1970s, the first model prevailed over the second. Found in the second era of contemporary Chinese history with new reliance on criminal apparatus and institutions was the conflict between the legal provisions which emphasized providing procedural safeguards to capital offenders and the sustained Strike Hard mentality stressing the

deterrent and retributive functions of capital punishment, between the legal principle calling for restricting the use of capital punishment to the most serious crimes, and practices of relying on capital punishment for social and political control.

Chapter Three moves from the general description and brief analysis of capital punishment law and practices during different eras of the Chinese history to a focus on recent reforms. It contains two general sections. The first, a thematic review of various reform measures since 2006/2007, comparing each category of these reform initiatives to the internationally recognized minimum standards in regards to the administration of capital punishment, attempting to describe not only what the Chinese authorities have done to date, but also what it has intentionally left out of its reform plan. Mainly included in the overview were the legislative efforts to narrow down the scope of capital offences in law and to exclude vulnerable groups from the use of capital punishment, the transition in execution methods from shooting to lethal injection, enhancing the procedural safeguards for capital offenders, and the transparency issue of making information with regard to the use of capital punishment publically available. The Second section briefly evaluates the practical and symbolic impact and implications of the reform measures.

Chapter Four examines the domestic impetus that created the need and opportunities for reform, as well as the constraints that hold back the reform. This chapter examines these factors and forces in three pairs – the conflicting impulses between populism and elitism; the tensions between judicial independence and political intervention; and the competing relationships between legal organs at the state level and lower levels. Not only the state-society relationship, but also the conflicts and

competitions within China's increasingly fragmented political as well as legal authorities are examined.

Chapter Five is devoted to the discussion of the impact of transnational norm diffusion in the existing political, legal and ideological setting in China. Section One charts the PRC's changing attitudes toward human rights – from outright objection to partial acceptance – in response to international scrutiny, criticism, and pressures. This is because the discourses and practices with regards to capital punishment in the context of the European-spearheaded abolitionist movement have been closely entwined with the discourses in the realm of human rights. More precisely, the cross-continental transmission of international standards regarding the use of capital punishment, for the purpose of discussion within this chapter, is a special issue area in the general topic of the promotion of international human rights. Discussions on the international campaign against the death penalty *versus* local impediments share many similarities with the universality *versus* relativity debate within international human rights law. The second section assesses the impact of international anti-death penalty dynamics on China's death penalty practices in theory, with case studies, and on the basis of empirical evidence from the elite interviews I have conducted with Chinese legal professionals in 2010. The conclusion drawn in this chapter is a complex and contradictory one – the international initiatives based on mechanisms of persuasion and acculturation influenced China's practice and policies. The recent capital punishment reform and the frequent reference to international jurisprudence and human rights norms during workshops, conferences and seminars participated by scholars, practitioners and policy-makers are evidence of the visibility and impact

of these external drivers. However, the chapter also revealed significant limits of these international initiatives due to existing political, legal and social institutional environment in China. These constraining forces includes political conservativeness surrounding topics of human rights and executions, hypersensitivity of the political and legal organs to public punitive impulses, lack of judicial independence at various levels of the Chinese society and many more. In sum, international human rights norms have limited effect, rather than full-fledged influences over alternating Chinese practice in the death penalty arena.

Chapter One. The Historical Context of the Use of Capital Punishment in China

Introduction

The death penalty, a cultural universal, refers to state-authorized and administered penal processes of putting convicted offenders to death as a punishment for crime. (Garland, 2010: 70) Capital punishment was a significant penal phenomenon in China not only because of its mere existence as a 'permanent fixture' (Scobell, 1990: 503) throughout Chinese civilization, but also due to its centrality in penal practices and penal culture from ancient times to modern China. The death penalty was practiced in China since the very early days of the ancient society, and has since evolved and survived for 'five thousand years' (Monthy, 1998: 191; Liang et al., 2006: 119). The majority of Chinese still attach serious moral commitments to this form of penal punishment and view it a necessary tool to protect society from evil offenders (Ho, 2005: 281-282; Macbean, 2008: 206-207). China has been home to the vast majority of executions worldwide (Macbean, 2008: 205), both in terms of the total numbers of executions (Hood and Hoyle, 2008: 3; Macbean, 2008: 205; Johnson and Zimring, 2006: 89-90) and executions *per capita* (Johnson and Zimring, 2009: 22-23).

Do the historically situated meanings of capital punishment matter in apprehending capital punishment practices and policies in today's China? The answer is probably yes. According to Johnson and Zimring, in the United States, 'many important aspects of contemporary capital punishment have been illuminated by situating

current American practice in a meaningful historical context' (Johnson and Zimring, 2006: 92). By analogy, there is little reason to suspect that history matters less in the Chinese context. It is highly likely that the institutions and processes of capital punishment in Chinese history and their changes over time can offer powerful clues to the patterns of capital punishment administration in the present day. Indeed, the institution of capital punishment in China today cannot be properly analysed without at least a brief understanding of its origins and past development.

Western legal scholars and criminologists often see explanations linking the historical norms and cultural values to modern capital punishment policies - frequently provided by Chinese academics (Liang, 2005; Macbean, 2008: 207), politicians and legal elites (Wyman, 1996-1997: 560) to defend and justify China's policies against foreign criticisms - as at best fallible, culturally-relativist excuses. Although these arguments merit close scrutiny, the fact that history and culture are used by the Chinese to defend their capital punishment policies does not exclude the possible existence of elements of truths in these arguments. To arrive at a conclusion that there is 'nothing singular in China's long history that can be clearly or closely linked to the country's high current rate of execution and that distinguishes China from its neighbours' (Johnson and Zimring, 2009: 245), we need to make some genuine efforts to prove it.

In reply to Garland's critique (Garland, 2005), Zimring explained that capital punishment in the United States is inextricably linked to 'vigilante values' in the U.S. - 'legal policies often have cultural roots but that does not make the policies immutable' (Zimring, 2005: 378). In other words, history and culture are important

shaping forces for the evolution of penal institutions, although they are neither the sole variant, nor the determinant force. Similarly, it is believed that history and tradition should not be excluded from the scope of this study on the use of capital punishment in China. To do justice to the rich historical heritage of Chinese capital punishment law and practices, the first section of this chapter provides a short review of the death penalty norms and practices in history, with a special focus on the lenient side of the regime. The second section identifies broad patterns and features emerging from the historical narratives. The third section further explores the possibility that China's historical experience with capital punishment can mark its contemporary policies. The historical framework in this chapter covers both the imperial times and the republican eras, that is, the entire period before the establishment of the PRC.

Section One. Law and Practice of the Death Penalty in Imperial China

For approximately 4000 years from the Xia Dynasty (2070-1650 B.C.) to the collapse of the Qing dynasty, the death penalty had been consistently and persistently an important penal institution for heinous crimes (Davis, 1987: 306) in China. On the one hand, clinging to the doctrine of *lex talionis*, imperial penal law of various dynasties placed great emphasis on the retributive value of the death penalty. The ideas that 'those who kill men should die; those who injure men should themselves be injured', and 'punishments are used to end punishments; the death penalty is used to frighten men' (McKnight, 1992: 324) acquired a proverbial currency and were regarded as truth by imperial rules. On the other, there are multiple aspects of imperial capital punishment law and practices that were heavily influence by

Confucianism. There are signs of leniency in the imperial capital punishment regime that merit careful consideration.

The Changes in Capital Punishment Law and Practice in Imperial History

It has been claimed that the origins of the imperial death penalty law dated back to the primitive eras of Emperor Huang (2601 B.C.) and Emperor Shun (2248 B.C.) (Alabaster, 1899: 52). It is said that the Yellow Emperor decapitated Ch'ih Yu in the wilderness of Cho-lu (Johnson, 1979: 60). Since then, capital punishment became the severest form of the Old Five Punishments (*Jiu Wu Xing*) – five categories of corporal punishments ranging from bodily mutilation to death, which were at the heart of the ancient penal system (Mühlhahn, 2009: 29). It was not until the reign of Emperor Wen (Around 167 B.C.) in the Han dynasty that those physically mutilating old five punishments were replaced by the more humane New Five Punishments - junior canning, serious canning, exiling, banishing and the death penalty - which passed down in subsequent dynasties (Chen, 2006: 54; Palmer, 1996: 108). Throughout the imperial penal history, capital punishment remained the sternest and most important penal sanction.

Two of the most common forms of execution in imperial times were strangulation and decapitation (Bodde and Morris, 1967: 91-92). Other forms of executions include, for instance, exposure or display of the head (*xiao shou*), which was a supplemental punishment to the death penalty for notorious criminals, especially robbers and rebels. Under this method of execution, after decapitation or death by slicing, the severed head of the criminal would be hung up in a cage and left for days or weeks at the execution ground or another public spot for everyone to see. Sometimes the head

would be paraded through the streets (Bodde and Morris, 1967: 93-95). Further, under the method of 'executing with exposure of the corpse' (*che*), the corpse is left exposed in a public place, instead of being buried immediately afterwards. This execution method was specifically purported to render the punishment more disgraceful. Other methods include 'beheading in public and casting away in the market place' (Gulik, 1956; Confucius, 1885), and *Ling Chi* or 'death by slicing'– also sometimes referred to in Western writings as 'lingering death'– a form of tormented execution involving repeatedly slicing the convict's flesh beyond the point of death which was reserved for treason and a very few other heinous crimes (Alabaster, 1899: 57-58).

Although the evolution of penal law in early imperial China, and in particular capital punishment law, manifested a general pattern of gradual moderation, evidenced by the abolition of corporal punishments (except for capital punishment) from imperial criminal codes in the Han dynasty and the introduction of legal mechanisms aimed at improving the penal regime and preventing miscarriages of justice in dynasties such as Han and Tang, the process of penal evolution was clearly not a lineal downward trend towards penal moderation and civilization. An indication of increasing cruelty in the administration of capital punishment in post-Tang dynasties was the legalization of the above-mentioned *lingchi* in imperial legal codes. *Lingchi* was originally practiced by tribes of the Tungus community in the Liao (916-1129) and the Later Zhou (951-60), and then adopted and institutionalized during later dynasties including Sung, Yuan, Ming and Qing (Ch'en, 1979: 42-43; McKnight, 1992: 451-452). The introduction of *Lingchi* as a main form of execution in imperial

China's criminal codes indicated the need of imperial rulers for punitivity and harshness to rule the country in later imperial times.

Different methods of executions were carefully distinguished and differentiated in imperial times to serve specific functions and express specific attitudes. In general, decapitation and slicing of the body were deemed to be more severe punishments in imperial times as they symbolically broke the line of patrilineal descent running through the offender's body (Palmer, 1996: 109). Thus they were reserved for the offences violating imperial rules protecting the interests of the father, elder brother, aged, husband, the state and the royal family in ancient China. This was probably because penal sanctions, including the death penalty, were used as instrument to govern the imperial state and punish those who challenge the established social order and authority of the emperors. For instance, disobedience to one's parents and other older relatives deserves the harshest forms of capital punishment because it was against the spirit of filial piety by destroying respect and reverence to elders (Kim and LeBlang, 1975: 90).

Offences deemed as the most heinous violation of social tenets, including murdering senior family members, violations of the temples, tombs, or places of the reigning house,¹ treason, parricide, mutilation of a living person for purposes of witchcraft, murder of three or more persons belonging to the same family, etc. (Bodde and Morris, 1967: 93) – the so-called 'Ten Abominations' – were punished by the most grave form of execution from Tang to Qing Dynasty because they were believed to

¹ In 1060, out of the total of 2560 people sentenced to die, 140 cases (5 per cent) involved people who had killed relatives, including mothers, fathers, uncles, and brothers. It also included wives who had killed husbands or concubines and husbands who had killed the parents of their wives. (McKnight, 1992: 452 and 469)

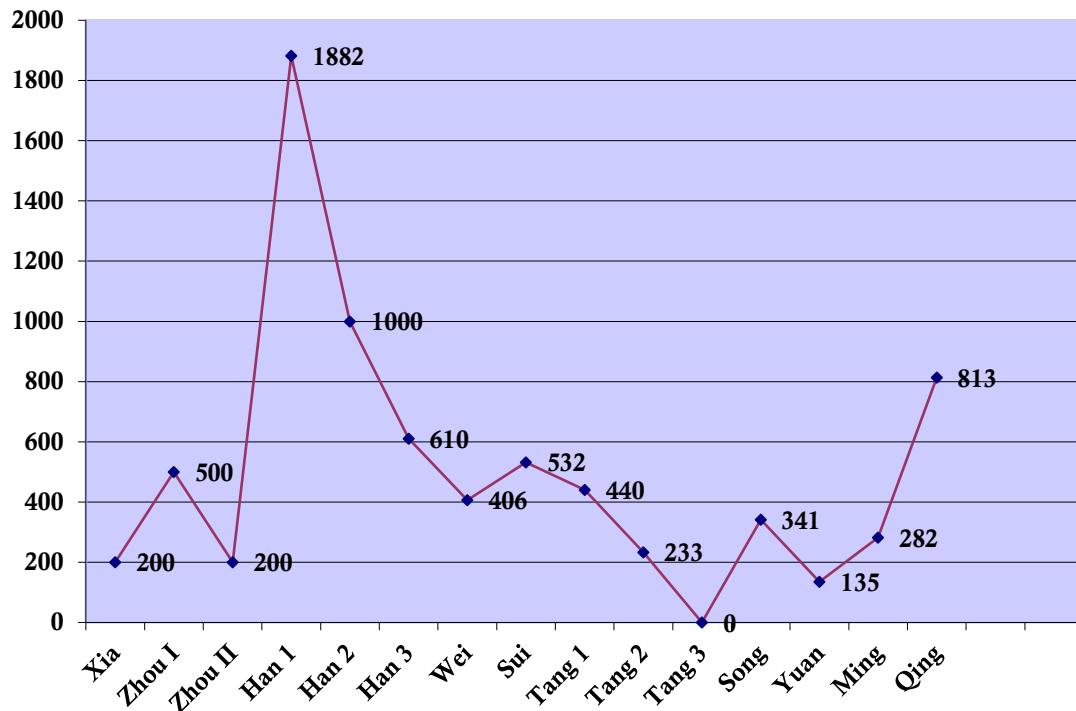
have broken the social as well as natural order or harmony, which lay at the heart of Confucian political ethics. In particular, death by slicing, which was believed to be capable of depriving the condemned persons' coherence existence in his 'future life' as the body of the prisoner is severely dismembered (Lu and Miethe, 2007: 37), was used to punish offences posing threats to the ruling class' ideologies and interests. For instance, there were two main forms of executions during the era of Yuan² – decapitation and slicing of the body. The latter was reserved for the most serious offences (MacCormack, 1990: 103).

In general, capital punishment persisted as an important penal institution for social control, order maintenance, and regulation of individuals and private groups (Lu and Miethe, 2007: 27) throughout imperial history, despite sporadic periods of abolition or extremely restrained use of capital punishment. For instance, capital punishment was once abolished in the Tang dynasty. In fact, the death penalty was the only form of the five most essential penal punishments that survived from the primitive societies until the Qing dynasty. Indeed, 'the death penalty enjoyed all the legitimacy that judicial tradition and legal codification could give' (Brook et al., 2008: 50). As there are extremely scarce historical archives documenting the volume of executions in imperial times, the number of capital offences as prescribed in penal codes in most imperial dynasties seemed a useful indicator of the patterns of ancient capital punishment practices. The most authoritative figures were calculated by the Chinese legal historian Shen Jiaben in Qing dynasty in his *Si Xing Zhi Shu* (the number of

² Strangulation was considered less severe than decapitation, for Chinese belief maintained that the offender in the former case would still preserve his head and thus obtain his rebirth in the next world. However, punishment by strangulation was abolished during Yuan perhaps because the Mongols did not entertain this Chinese belief and saw no significant difference between the two kinds of death. (Ch'en, 1979: 43)

capital offences) and other writings, on the basis of thorough reading of all major imperial penal codes (See Table 1 in the Appendix).

Figure 1: The Number of Capital Offences in Imperial China



Note:

1. Only one number is shown for each dynasty. However, the number of capital offences did change over time within some dynasties. For instance, there were 239 capital offences in mid-17th century Qing dynasty. However, at the beginning of the 20th century, the number had grown to more than 813 (Shen, 1964a: 882).
2. While it is not entirely clear from Shen's writings whether the number of capital offences enacted in special Ming criminal statutes - *Bian Chi* - increased *by* 60 or *to* 60 during Jiayou period (1056-1063), the preface to the Treatise on Penal Law in the Sung history seems to suggest the former. Therefore, the figure for Sung dynasty should be 341 (Shen, 1964b: 532-533).

One trend discernible from the above figures was the growing severity of capital punishment law towards the later imperial eras. Although earlier dynasties have made great efforts to reduce the number of offences subject to capital punishment, one can hardly identify significant processes of penal moderation regarding capital punishment legislation in later imperial dynasties. In contrary, the number of capital offences increased gradually from Tang to Qing. The rising number of capital offences towards the latter stages of imperial era (see Figure 1) indicates that there was an expanding list of criminal behaviours subject to the death penalty in the later dynasties.

According to the first law of penal revolution, as the socio-economic conditions improve and the society develops, penal punishment in a particular jurisdiction in general should decrease in severity, rather than increase (Durkheim, 1973). Multiple evidence regarding the number of capital offences in law, the amnesty regime, the methods of executions all indicate that the historical trajectory of capital punishment law and practices towards late imperial China contradict this general trend observed by Durkheim. Why? There are a few theories offering tentative explanations for this increase.

For one, the latter dynasties, apart from Ming, were all established and ruled by northern military tribes. These alien tribes were originally less-civilized and ethnically-different from the majority of the Han ethnic group. They held on to

stronger military spirits emphasizing ruling by coercion; they were less socialized into the Han culture of Confucianism, harmony and the natural relationships between people; they resorted to harsh punishments to obtain unqualified obedience from an actively hostile Han population. This could possibly explain the ruling regime's reliance on capital punishment and thus the growing entrenchment of capital punishment in the penal law and practice in imperial China.

For another, institutional incapacity could possibly explain part of the story.

Towards the late imperial eras, judicial authorities increasingly focused their energy on criminal cases (in particular the most serious ones) and delegated judicial power to local officials due to the less efficient state-run law enforcement agencies, the increasing reliance of judicial staff on informal dispute resolutions and nonofficial organizations – guilds, clans, societies – to resolve disputes, and the decreasing and weaker involvement of the state in local governance. The growing insecurity of the government to govern a populous country with penal instruments in practice could possibly tempt it to increase the severity of the penal law to prevent its power from slipping away (McKnight, 1981: 126).

Therefore, capital punishment served as an essential tool for political governance in imperial China. It was heavily used by imperial rulers whenever there was strong political demand for punitive penal sanctions. The increasing harshness in capital punishment law and practices towards late imperial times was not the only evidence supporting such a proposition. Another important signal is that imperial rulers always meted out harsh penal punishments during chaotic eras and merciful

treatments were granted during peaceful times. The pattern of oscillating levels of penal punitivity regarding the use of capital punishment can be found in most imperial dynasties. For instance, in the aftermath of almost every peasant uprising throughout history, the surviving government to maintain tight control of the population carried out massive executions (Lu and Miethe, 2007: 31). As an old Chinese legal proverb says, imperial rulers tended to govern tumultuous times with harsh punishments (*zhi luan shi yong zhong dian*). Short-run political considerations loomed large on the changing capital punishment policies in imperial times. For example, rulers on shaky thrones might wish to strengthen their positions and authority by deterring criminal conducts with harsh penal punishments.

The Influences of Confucian and Legalist Philosophy in Capital Punishment Law and Practices in Imperial China

These above-mentioned benevolent aspects of the imperial death penalty system, on which the influences of Confucian ethics left a deep mark, have enduring relevance for an analysis of contemporary practice. In fact, the imperial death penalty system is not as harsh and cruel as it may at first appear (Kim and LeBlang, 1975: 105). Kim and LeBlang compared the Chinese and English death penalty practices and pointed out that theft merited death in China only when the value exceeded 120 ounces of silver or was thrice committed, which was in excess of 50 ounces; while in pre-industrial England, up to 1818, the death penalty was given for stealing goods valued at a mere 5 shillings (Kim and LeBlang, 1975: 103). Another comparison made by Brook, Bourgon and Blue found that English law in 1819 had 223 capital crimes on the books while from mid-Tang (7th century A.D.) to Ming (16th century A.D.), the

number of capital crimes in imperial Chinese legal codes remained under 300 for most of the period (Brook et al., 2008: 54). Many aspects of the imperial capital punishment law and practices can be explained by the influences of both Legalism and Confucianism.

The Imperial penal system showed clear signs of influences by both the Confucian theory of *Li* (Morality) (Peerenboom, 2002: 28; Liu, 1998: 5)³ and the Legalist theory of *Fa*⁴ (McKnight, 1992: 21-22). Legalist thinking first took roots in the Warring State Period, laying emphasis on the enforcement of heavy punishments to maintain legal order and relying on theories of retribution and deterrence to rule the people⁵ (Kim and LeBlang, 1975: 81; Ch'u, 1961: 263-264). This string of utilitarian thoughts gained prominence during the first imperial empire in the Chinese history, the Qin Dynasty. The excessive despotic governance by Qin rulers on the basis of extremely punitive penal sanctions led to the quick collapse of the empire. Succeeding dynasties – in particular the Han Dynasty – learnt a lesson from the failure of Qin's governing strategy and made Confucianism the orthodox ideology instead. However, the difficult and complicated task to govern a vast country with a large population made imperial rulers of all the successive dynasties resort to Legalist punitiveness to maintain order and stability whenever the ruling regimes believed their rule was in danger (Palmer, 1996: 108). Legalist philosophy remained influential in the political

³ The rule of *li*, traditionally associated with Confucianism, refers to political order predicated on and exerted its influence mainly on the *li* or rites, that is, traditional customs, mores, and norms rather than on the imperial written codes.

⁴ In the chaotic conditions of the Warring States period (403-221 B.C.), Legalist thinkers espoused the use of realpolitik in relations among states and the use of law in the internal control of bureaucracies and commoners.

⁵ For instance, Legalists believed that 'if you govern by punishment the people will fear. Being fearful they will not commit villainies; there being no villainies, people will be happy in what they enjoy. If, however, you teach the people by righteousness, then they will be lax, and if they are lax there will be disorder; if there is disorder, the people will suffer from what they dislike.'

as well as penal field of diverse dynasties until the fall of the imperial penal system in early 20th century.

In contrast, Confucius and his followers advocated governing the country in accordance with approved moral norms (*li*), rather than codified law (*fa*). Persuasion and moral example, therefore, are supposed to play a much larger role in solving disputes as well as controlling crimes and deviance than coercion and deterrence. This Confucian doctrine, as stated above, was not recognized as orthodox theory by the state-ruler until the Han Dynasty (McKnight, 1992: 22; Cohen, 1968: 5; Liu, 1998: 13). Confucian beliefs held that ‘lead the people with government regulations and organize them with penal law, and they will avoid punishments but will be without shame. Lead them with virtue and organize them through the *Li*, and the people will have a sense of shame and moreover will become humane people of good character.’ (Confucius, 1971) In particular, Confucius agreed with the saying that ‘if benevolent men were to rule a state a hundred years, they would be able to tame brutes and abolish capital punishment.’(Confucius, 1971)

These two schools of thought have both deeply influenced the development of the Chinese death penalty regime. Legalists influenced on the drafting of highly elaborated and regularized imperial penal codes, and therefore legal institutions gradually developed over almost all dynasties. Meanwhile, magistrates referred to the Confucian *Li* as supplements to these written laws and standards⁶ for implementing these written laws (Boxer, 1999). The influences of Confucian philosophies were so profound that on some occasions their super-law status caused discrepancy between

⁶ In Qing China, for instance, the Magistrates who are in charge of the judicial administration had large room of deliberation that the written penal codes often were easily circumvented.

the letter of law and the practice in imperial China (Hulsewé, 1955: 9). Hence the source of penal law in imperial China was two-part: the complex series of punishments and the elaborate hierarchy of institutions for adjudicating guilt and passing penal sentences (Cohen, 1968: 5) inspired by Legalism were not the only bases of decisions in most cases. *Li* and other sources outside of the codes - i.e. rites, virtue, precedents, moral norms, and customs - were also indispensable components of the judicial decision-making processes.

Certain aspects of the imperial penal system was disciplinary and repressive (Lu and Miethé 36) under the influences of Legalism. Physical torture was a regular practice by judges, who assumed multiple roles in the inquisitorial trials as the judge, the prosecutor, the defence lawyer and the interrogator. Magistrates were allowed to question and interrogate all parties involved in capital cases, including the offender, the victims and the witnesses (Miyazaki, 1980: 132-162; Conner, 2000). Legal defence by litigation tricksters (people who had legal knowledge of litigation and the legal system) or other third parties was forbidden in courts unless those people were a close relative, largely because the authorities saw adversarial procedures as rebellion, disrespect and challenge to the state authority (Miyazaki, 1980: 69-72; Bodde and Morris, 1967: 413-423; Alford, 1984: 26-27). In particular, Legalism encouraged the expansion of the scope of capital punishment offences in law and the adoption of cruel methods of executions as capital punishment was considered as the most effective deterrent to govern the country and the ultimate punishment to right the wrongs.

The formal criminal justice systems created under the influences of the Legalist school of thought were tempered with Confucian benevolence and humanity to provide capital punishment defendants with various procedural safeguards. Most of the lenient aspects of the imperial capital punishment regime, as discussed in the section above, were illustrations of such influences. For instance, if a capital case had been handled according to law, a Sung criminal would have been treated with extreme care. His sentence would be commuted to a lesser punishment if he qualified as one of the certain categories of offenders not subject to the scope of capital punishment. If he did not belong to these categories, his conviction would have passed through a preliminary hearing at the district level, resulting in a finding and a recommendation for sentencing that would be sent up to the prefecture for review. After review the prefecture would forward the material for the circuit level if the circumstances of the case were clear and did not indicate that a more lenient or more severe sentence was appropriate. If the circuit felt that it could not render a final decision, the case might be sent for review to the capital (McKnight, 1992: 469-470). After all these lengthy reviews at both the local level and the central level, the defendant would still have the opportunity to be granted amnesty or pardon. This capital regime was influenced by humanistic spirits in native legal thinking, inspired by Confucianism.

Evidence of the Confucian influences on death penalty practice could also be seen in the timing of executions. Execution, a means of taking life, was considered to have its place in the order of nature and the universe, according to Confucian ideological roots traceable back to the 'Monthly Ordinances' in the *Book of Rites*. Under Confucian philosophy, spring and summer were the seasons of growth and

maturation, when carrying out executions would be in violation of the natural order, hampering the harmony of nature and causing disaster. Hence, condemned prisoners were usually held until the arrival of autumn and winter when they could be executed according to the order of the heave and the nature of the season of death (McKnight, 1992: 455; Bodde and Morris, 1967: 93-94).

Nevertheless, Confucianism also tolerated and justified inequality and injustice in the administration of penal justice and the death penalty according to the social and political status of the parties involved. Thus the rich and powerful liable for capital offences often were able to escape with their lives and the poor and weak would suffer execution (McKnight, 1992: 470). In particular, various dynasties allowed death convicts to have their death penalty redeemed with money. For instance, in the T'ang Dynasty, capital sentences could be redeemed by payment of copper of 120 chin (Johnson, 1979: 60-61). The legacy of 'redemption for life' in imperial history has inspired contemporary reformers to the new idea of commuting the death penalty of the defendant to lesser sentences if he offers adequate compensation for the victim and victim's family (Johnson and Zimring, 2009: 277).

Under the influences of both theories, criminal punishment in imperial China oscillated between the two extremes of severity and mildness. Motivating factors behind the changing capital punishment policies, however, were mainly political pragmatism. For instance, it was common that at the beginning of a dynasty the ruler would issue light punishments and grant amnesties to prisoners in order to show their benevolence and to earn support from the people, while towards the end of a dynasty the rulers would rely on heavy punishments to tackle and mitigate all kinds of social problems and conflicts out of their control. Also, a legal proverb says

that ‘lenient rules should be enforced during peaceful and flourishing times’ (*zhi ping shi yong qing dian*). Take the Tang dynasty as an example. Emperor Gaozu restricted the death penalty to murder, robbery, desertion from the army, and treason (Lu and Miethe, 2007: 30; Johnson, 1979: 39). Furthermore, the death penalty was briefly abolished during the peacefully ordered mid-Tang (Shen, 1964b).

Signs of Leniency in Capital Punishment Law and Practices in Imperial China

One significant aspect of capital punishment regimes in China’s imperial era was the meticulous review and checking procedures in capital cases. The mechanism of the ‘inspection of cases’ (*lu-ch’iuu*), which was established in the Han dynasty, reflected imperial rulers’ concerns for potential judicial abuses in penal cases. Under this scheme, the emperor, central-level and local political-judicial officials would review or re-adjudicate the verdicts of penal cases which may result in miscarriages of justice. The introduction of this judicial procedure resulted in decreased penal severity and in particular less recourse to capital punishment (McKnight, 1981: 99) by either reducing the original death sentencing to lesser degrees of penal punishment or granting the prisoners amnesty. This scheme of penal case inspection, arguably, was the ancient origin of the assizes system in later dynasties and the death penalty review procedures by the SPC in the present day.

That all death penalty cases must be subject to approval by the highest judicial body in the capital region and even the emperor himself was first established as a formal

judicial procedure by Emperor Wen of the Sui dynasty⁷, and followed by T'ang, Sung Yuan and Ming and Ch'ing. The T'ang Dynasty was known for its unprecedented leniency in penal law and practice. Capital review schemes gradually took shape during this era. To prevent miscarriages of justice in capital trials, Emperor *Tai* in early Tang demanded that all death penalty cases in the capital region must be submitted for his approval five times (*Five Repeated Reviews*) and capital cases outside the capital region must be reported to him for approval three times (*Three Repeated Reviews*).

Apart from the meticulous review mechanisms, which continued to gain sophistication in later dynasties, the Sung rulers created 'on the spot investigations' to prevent judicial intendants from covering up capital cases about which the circumstances were in doubt and to make sure that wrongful convictions would be reversed; Southern Sung legal authorities initiated the inquest procedures and policies to investigate on judicial tortures in capital cases (McKnight, 1992: 237-238). Legal authorities in this period were also credited for their endeavours to fight errors and injustice by introducing a final and formal inspection procedure at the end of trials - defendants were to have the judgements read to them and acknowledge their accuracy before sentences were affirmed by the defendant putting his name or fingerprint on the document.

The Great Ming Code prescribed a detailed death penalty review system and established the Court Assize system (Kim and LeBlang, 1975: 77-103). In fact, under

⁷ Emperor Wen forbade the pronouncement of final judgement in capital cases at the provincial level and ordered them to be transferred to the supreme judicial organ for approval and review. This was the so-called *Court of Revision*.

the reign of various emperors, apart from the Court Assizes, Spring Assizes, Hot Weather Assizes and even Winter Assizes were administered during Ming Dynasty (McKnight, 1981: 98-103). A dual system of capital sentences was introduced into the Ming penal law, one for 'execution without delay' (*li jue*), the other for capital punishment subject to revision at the Autumn Assizes (*jian hou qiu hou chu jue*) (Meijer, 1984: 2).

Under such an obligatory review scheme, two types of death sentences were established: that in which execution was to be immediate, in the sense that no further review was possible and the offender was put to death as soon as possible after the confirmation by the throne, e.g. decapitation certain and strangulation certain; and that in which execution was to be deferred until confirmation of the sentence had been obtained through the Autumn Assizes, e.g. decapitation subject to revision at the Autumn Assize and strangulation subject to revision at the Autumn Assize (MacCormack, 1990: 77). This two-fold capital sentence system was arguably the antecedent of the dual system of immediate executions and suspended death sentence with a two-year reprieve established in China's current capital punishment practices and law.

According to the Great Ming Code, the emperors' investigating agents in the capital region or local areas examined the decisions of capital cases to check if there was possibility of miscarriages of justice. They subsequently submitted their judgements to the Ministry of Justice. The Ministry of Justice in turn would report by memorials to the throne and then wait for the imperial to reply. If the death penalty was approved by the throne, the offender was executed, in the capital region, jointly by

the officials delegated by the Ministry of Justice and the investigating censors; or, outside the capital area, jointly by the officials delegated by provincial-level Administration Commissions and provincial Surveillance Commissions (Jiang, 2005: 235-236). One of the Ming emperors once reasoned after reviewing capital cases, 'what is most important is really to get the facts and have the punishment correspond to the crime' (McKnight, 1981: 101).

Under the Qing Code - the code of the last dynasty of the Chinese Empire – the penalty of death continued to have two degrees – those capable of immediate executions (*li jue*) and those to be executed after the final review of capital cases (*Jian Hou*). The criteria which distinguished the two included the sub-statute (*Li*), e.g. whether the circumstances required the infliction of capital punishment, allowed delay of execution, gave rise to compassion, or doubts (Jones, 1994: 34). Qing patterned its practice after Ming and practiced both Hot Weather Assizes and annual Assizes occurring in the autumn, including both Court Assizes and the Autumn Assize system. The Assizes gave convict on death row the hope to have their case overturned and possibly reduced.

Under the Autumn Assizes system in Qing, the majority of capital cases except those qualifying for execution without delay were submitted by the provincial-level authorities to the Judiciary Board for review, and then the lists would be submitted to the throne for final decision (Alabaster, 1899: 27-29; McKnight, 1992: 99 and 356). This extensive review process allowed higher levels of courts to carefully scrutinize every capital case at the highest level and made it possible for imperial ratification before life may be taken (Bodde and Morris, 1967: 131). During the Assizes process,

the reviewing authorities would carefully weigh the circumstances of the criminal behaviour and characteristics of the criminals according to criteria established by codes and practice (Davis, 1987: 307).

According to the estimates of Bodde and Morris, roughly 40% of the total capital offenders were sentenced to immediate executions. This means that they would face a local trial, a regular review and then the final execution (Bodde and Morris, 1967: 140-141). The Assizes system, ‘probably a heritage of Confucianism’ and ‘an entirely natural outgrowth of earlier cautiousness toward the taking of human life’, allowed for great imperial mercy in the reduction and commutation of sentences and also permitted responsible officials a final opportunity to erase injustice from the lower levels of judiciary⁸ (Kim and LeBlang, 1975: 99-100). This procedure diverted a capital case into a range of possibilities of delay and commutations including, in particular, the system of imperial amnesties (Palmer, 1996: 110). The complicated and sometime even toilsome Assizes system resulted in a rise of *de facto* long-term imprisonments due to the tension within the criminal justice system between limited resources and large case loads. The schemes of capital reviews in the penal history of imperial dynasties provided direct evidence that humanistic concerns for criminal defendants – at least their right to have their cases reviewed and their right to fair trials – were in the ‘genes’ of ancient Chinese criminal justice system. Assizes system

⁸ A related judicial practice, arguably in relation to the institutionalization of capital review schemes in imperial penal regime, was the petition by people involved in judicial cases. Under the petition scheme, any party involved in the capital cases and family could bypass the lower-level jurisdiction and file petition to a higher authority if they believed that the outcome of the case was unjust or there might be miscarriages of justice in the adjudication. Defendants also had a final chance to plea for innocent at the final execution spot. Upon proclamation of innocence in this setting, a retrial was required on the facts of the particular case. (Miyazaki, 1980)

allowed jurists in imperial China to sow seeds of benevolent spirits, under the influence of Confucianism.

Another dimension of the capital regimes in imperial times which reflects the lenient aspect of capital punishment practices was the amnesty scheme. Amnesties and acts of grace issued by the imperial rulers can be traced as far back as the founding of the Western Chou (ca. 1027 B.C.). General or occasional amnesties were frequently granted in Tang dynasty (McKnight, 1981). The T'ang dynasty developed a frequent and remarkable amnesty system 'without precedent elsewhere in the world' – every 'two years or less, the state opened up its judicial doors, returning to society almost all of the criminals in its grasp and preventing forever the persecution of those who had succeeded in eluding it' (McKnight, 1981: 72). Since then, amnesties and pardons became a regularly practice in following dynasties, during which either the condemned offenders were freed from their crime convictions, or had their death sentences commuted to a lesser punishment (Lu and Miethe, 2007: 35). For instance, in June 1504, Ming Emperor Xiao Zong commuted the death sentences of 60 prisoners on death row to penal servitude and spared the death sentences of another two after a beating (*Shilu*, 1962: 198.10b-198.11a).

A variety of considerations, including institutional, philosophical and religious thoughts, underlay the distribution of amnesties in imperial China. Granting amnesty to prisoners was not only a reflection of the Confucian concerns that dangers and faults are inherent in harsh penal punishments, but also a belief that miscarriages of justice and long-delayed justice may disturb the harmonious blending of natural forces and that this order needs to be restored by the corrective action of an amnesty -

an assumption that the emperor had the power to cleanse individuals of their taint and reintegrate them into the social body and a desire on the part of the Emperor to display his benevolence (McKnight, 1981). The mercy granted by the emperors was not only a result of the beliefs of rulers in benevolence, it was also a solution to institutional incapacity and inadequacy – the state had limited resources such as judicial personnel and facilities to punish a large number of criminals, in particular because there were no prisons in traditional China (McKnight, 1981: 116).

Along with other factors such as the review procedures in capital cases, amnesty contributed to the significant reduction of executions in imperial times. For instance, with the unprecedentedly frequent amnesties granted by emperors in Sung, in practice, it was estimated that only about 10% of capital offenders were executed (McKnight, 1981: 147, footnote 12). Nevertheless, it is possible that amnesties played a less prominent role in post-Sung judicial practices. In particular, available evidence raises the possibility that the scope of amnesties in Qing was more restricted than that of amnesties issued in Tang and Sung as the scope of offenders qualify pardons were narrower than earlier dynasties (McKnight, 1981: 109).

Hypothetically, frequent amnesties granted by the rulers can be motivated by strategic political concerns – newly enthroned rulers may wish to reassure potential enemies; in times of external danger rulers might see amnesties as acts to appease internal chaos; freeing prisoners from the threat of judicial deaths could mobilize national support for the regime. However, after observing the amnesties granted by major dynasties to criminal offenders in Chinese history, McKnight concludes that there appears a tendency of increasing penal harshness and unwillingness by the

authorities to treat criminals with leniency with the succession of imperial dynasties (McKnight, 1992: 112-113).

A third indicator of forces promoting leniency and restraint in capital punishment law and practices in imperial times was the rules under which certain groups of persons should be exempted from, or have their capital offences mitigated from, the ultimate punishment. For instance, in the Tang dynasty, vulnerable groups, including the aged, the young, the disabled, the ill, and the mentally incompetent were eligible to be exempted from capital punishment or have their punishment mitigated (Johnson, 1979: 29; MacCormack, 1990: 110-114) largely because of the Confucian ideals of benevolence and humanity (Lu and Miethe, 2007: 33-34). For instance, the rationale of age being a ground for mitigation or exemption of the penalty of death is to be found in the Confucian conception of the old as deserving of respect, as expressed in the main ritual classic, the Book of Rites (Confucius, 1885).

Pregnant women were also granted a stay of execution. For instance, pursuant to statute a woman guilty of a capital crime who gave birth to a child while awaiting execution was allowed to live and care for the child for 100 days before execution - unless she was sentenced to death by slicing, in which case she was allowed only 30 days (Bodde and Morris, 1967: 144). This was because the humanistic and moral underpinnings of Confucian theories discouraged the punishment of disadvantaged classes of person. Penal codes in later imperial dynasties also generally refrained from imposing the death penalty for the elderly, the infirm, minors and other special categories (Palmer, 1996: 110). As an example, in the Ming Dynasty, for people 90 years of age or older, even if they committed crimes punishable by the death penalty,

they would not be prosecuted (with the exception of committing rebellion or great sedition) (Jiang, 2005: lxv).

Section Two. Late-Qing Reforms and the Republican Era

Imperial penal codes and institutions proved to be increasingly inadequate and inefficient to cope with rising social problems towards the end of the Qing dynasty. Under substantive pressure from both domestic 'Boxer Rebellions' and the invasion of colonial forces from abroad, the rulers of the Qing dynasty resorted to 'reforms' and 'new policies' to appease the violent social upheaval at home that brought the empire to the brink of collapse and to build up public confidence in the Qing's ruling regime. The administration of justice, as well the bureaucratic apparatus, was central to this tide of reforms. An influx of Western⁹ and modern legal concepts and practices were introduced into the Qing Empire. This was the first era of significant legal modernization and Westernization in Chinese history; a second one would not occur until seven decades later in the contemporary era of social and economic reform in the PRC.

In 1902, a Law Codification Commission was established to modernize the Qing legal system, which was known among legal historians as *Amending of the Law by Shen Jiaben*¹⁰ or *Xinzheng* Legal Reforms (Bourgon, 2003). This substantive revamp of the Chinese legal system aimed to adapt native Chinese legal thinking, norms, institutions and practices to legal frameworks and concepts initially developed in the

⁹ For a detailed description of the advocates insisting on adopt Western values and legal structures, please see (Weatherley, 1999: 65-82).

¹⁰ The imperial government appointed the well-known jurist, Shen Jia-ben, as Minister of Legal Reform. Shen consulted Japanese legal advisors in the drafting of new legal codes.

European-American context. Transformation of penal theories, practices as well as institutions took place. Old laws were abolished, old customs died out. 'Modern' codes were drawn up. It was a new age for penal justice in China. Among these changes, the significance of reforms of the imperial capital punishment regime cannot be ignored. Those who argued for reform of the old regime held beliefs including the growing recognition among Chinese jurists that capital punishment was far from an effective deterrent, that cruel punishments such as capital punishment conflict with the spirits of Confucian Humanitarianism, and that China's use of cruel methods of execution had brought disgrace to its reputation in the eyes of foreign countries (Kim and LeBIang, 1975: 104).

The first step of the reform process involved drafting the transitional Current Penal Code of Great Qing (CPCGQ), which was promulgated in 1909. Although CPCGQ was drafted on the basis of the Great Qing Code, and thus mainly embodied the last stage of traditional penal law, it represented some of the new improvements during the reform era. In fact, CPCGQ was published as a temporary compromise between reformists and conservatives as the New Penal Code of the Great Qing (NPCGQ), which represented a break from the past, was under the attack of conservatives after its promulgation in 1908. Under the CPCGQ, widely-reviled cruel forms of execution including death by slicing, exposure of the dead body, and torture of the dead body were abolished and only beheading and strangulation were retained as legitimate forms of execution.

All those crimes originally punishable by death by slicing were instead punishable by immediate beheading; the crimes punishable by immediate beheading were changed to immediate strangulation; the crimes punishable by beheading after the assizes

were changed to strangulation after the assizes; immediate strangulation was commuted to strangulation after assizes; while those offences punishable by strangulation after assizes remained as they were. In sum, punishments for all categories of capital crimes were scaled down one level in terms of their severity (Li, 1957b: 78). Apart from the reform of the system of punishments, the criminal procedures became more humane and ideas promoting separation and independence of the judiciary was introduced as the reform progressed (Williams, 1922: 55-57).

Putting an end to the gruesome forms of executions signalled a turning point in history when the regime was prepared to accept the idea that China's punishments should be brought into line with modern standards (Brook et al., 2008: 5). The significance of tormented deaths and judicial torture shifting from being 'opening legitimized' to 'official prohibition and ashamed tolerance' (Bourgon, 2003: 851) should not be underestimated. Although judicial torture and horrible forms of executions were still practiced many years after their official abolition from the law at the end of Qing¹¹, As Foucault puts it, this transition represented a change in the 'economy of power', a shifting emphasis of the state penal regime from punishment of the body to discipline of the soul. The New Penal Code of the Great Qing, which was eventually published in 1910, further reduced the lawful execution method to solely strangulation. In addition, given that the death penalty was widely prescribed in imperial codes and frequently used in practice, a reduction in the number of

¹¹ The difficulty in abolishing inhumane forms of execution and judicial tortures was indeed an illustration of the commonly seen phenomenon in China, both in history and in contemporary era, that to abolish outdated practices from the law does not necessarily result in the disappearance of such practices in the real world. Judicial torture and illegal forms of executions remained outlawed but recurrent for a long period after their abolition in the end of Qing. Evidence of the difficulty to eradicate such practices included photographs of exposed heads during the Warlord period and the common extrajudicial summary executions during civil wars (Bourgon, 2003). Moreover, needless to say that judicial torture still lingers in the penal practice of China today.

capital offences was one important aspect of the legal reform at the turn of the 20th century. The number of offences punishable by death stayed at an historical peak of 813 in Qing's Collected Administrative Precedents and Sub-statutes (*Huidian Shili*) (Brook et al., 2008: 54), however, after the reform, death eligible crimes sharply dropped to a low point of only 20 (Chen, 2006: 55; Chen, 2008a: 294).

Furthermore, executions were removed from public purview after the Xinzheng legal reform at the end of Qing. Most executions in imperial times, from beheading to *lingchi*, were carried out in before the public. Although the state-sanctioned practice of sentencing the convicted prisoner to death already expressed the attitudes of disapproval by the state and on the behalf of the community, publicized executions took these ritualistic condemnations to an extreme by providing open spaces and theatrical ground for the conveyance and reinforcement of the collective consciousness and sentiments among those who assembled to witness the rituals of torture and putting the offenders to death. Marketplaces, an important site for urban commerce and trade, were commonly used as the public execution ground. For instance, the best known site of execution in Beijing is the Vegetable Market Intersection (*caishikou*) (Bourgon, 2003: 65).

In fact, public execution was called *qi shi* (abandon at the marketplace) in ancient Chinese language. They are the most direct evidence that the death penalty was aimed at deterrence and a manifestation of the political authority of the imperial state (Lu and Miethe, 2007: 37). In the latter half of the nineteenth century, when public executions became increasingly rare in the West, executions in China remained highly publicized. These displays of executions were regarded as proof of the

barbarity and cruelty of the Chinese penal regime in the eyes of foreigners. And thus the reform measures of forbidding public executions could possibly be seen as initiatives on the side of the Qing government to gain complete judicial sovereignty over the Chinese territory as the Western colonial forces promised to relinquish extraterritoriality of China once the severity of the imperial legal system was lessened according to Western standards.

Scholars held divergent views on the motivating forces behind the *Xinzheng* Legal Reforms. Meijer, for instance, believed that the spur for reforms mainly came from abroad. It was the Qing' ruler's eagerness to get rid of extraterritoriality, which was imposed by unequal treaties forced upon China by foreign colonial forces, that prompted the efforts of Qing reformers to revise penal laws in accordance with modern, Western standards of due process at that time (Meijer, 1976: 32; Fairbank and Liu, 1980: 408). Alternatively, Bourgon considered that Meijer's foreign-impetus theory overshadowed the Chinese commitment to legal reform. His view was that, to a great extent, the *Xinzheng* reforms were the result of a long-term evolution of the Chinese penal regime towards moderation. To him, 'the balance of power' between China and Western colonial forces only provided the opportunity and the technical means for reforms. The *Xinzheng* reform represented the efforts of 'a long chain of pro-humanitarianism jurists to civilize the Chinese penal regime and a strong contribution of the humanitarian aspect of Chinese native penal culture (Bourgon, 2003).

The NPCGQ formed the basis of penal law in the Republican era of China. This period can be further divided into two eras: the Beiyang government (1911-1928) and

the Nationalist (*Guomindang*) government (1928-1948). Both eras saw the continuing efforts to modernize the imperial penal system made by Republican jurists. Capital punishment by strangulation remained the only death penalty on the books in the turbulent Warlord era and later under the Nationalist government. The provisional Criminal Code of the Republic of China under the Beiyang Warlord regime provided that the execution of capital punishment by strangling would take place in the precincts of a jail (Williams, 1922: 55; Yuen and Loh, [1912] 1915: article 38; Chang, 1935: article 33). Moreover, the Kuomintang judicial regime in the 1930s saw a wave of heated debate among jurists on capital punishment related topics, including its deterrence value (Cai, 2011; Dikötter, 2002: 180). Even the then president of the Judicial Yuan, Ju Zheng, was an abolitionist (Ju and Chen, 1998-2000: 277). Under Guomindang's rule, the crime endemic in the 1930s in Shanghai, for example, did not lead to an increased use punitive measures in that region.

On the one hand, archival research found that there were relatively low numbers of death sentences and executions administered by the official judiciary in the Republican era. Even during the turbulent years of the Beiyang government, there was merely an average of 231 prisoners condemned per year nationwide from 1914 to 1921 (see Figure 2). Similarly, scholars have observed that judicial authorities under the rule of Nationalists passed very few death sentences. For instance, only 188 of 70,000 criminals were condemned to death in 1931; and only 122 were sentenced to death out of 46,000 offenders convicted in 1933 (Dikötter, 2002: 77, 181, 231, and 336).

Figure 2: Death Sentences and Executions by the Beiyang Government
(1914-1921)

Year	Death Sentences Imposed by Courts of the First Instance	Number of Criminal Cases Heard by Courts of the First Instance	Ratio of Death Sentences per Criminal Cases	Executions
1914	159	31033	0.5%	364
1915	335	37257	0.8%	357
1916	156	27286	0.6%	197
1917	271	31215	0.9%	263
1918	162	26894	0.6%	179
1919	109	27429	0.4%	184
1920	107	31797	0.3%	131
1921	124	32971	0.4%	172
Average	178	30735	0.6%	231

Note:

One possible explanation for the fact that the number of executions per year in 1914 and 1915 superseded the death sentences meted out per year in both years could be the backlog from previous years.

Source:

The Ministry of justice (comp.) and the Commission on extraterritoriality (pub.), 'Judicial Statistics of the Third to the Tenth Year of the Republic of China' (Peking, 1925)

On the other hand, extra-judicial killings and cruel forms of executions were recurrent in this chaotic Republican era. Even in times of relative stability when martial law was not in force, Chinese newspapers frequently reported arrests and executions without any reference to formal court procedure (Davis, 1987: 309). The use of the death penalty in the Warlord period was difficult to describe systematically because various short-lived military forces, both at the local and central level, took control of different regions of China in turn and enforced their own legal policies to consolidate the power of their authority and force compliance among civilians. It was undoubtedly the case that capital punishment was retained for the purpose of enhancing the power of various forces and to entice compliance with their rule (Davis, 1987). Similarly, capital punishment was an instrument for political rule under the Nationalist regime. Ju Zheng, for instance, despite his abolitionist position, openly endorsed the idea that the entire judicial system then should be instrumental to serve the interests of the ruling Nationalist Party (Ju and Chen, 1998-2000).

Section Three. Implications for Today: the Historical Legacy of Imperial Capital

Punishment Regime

One of the main purposes of giving the study of the past a place in research on the present in this thesis is to examine the relationship between the imperial history of capital punishment law as well as practices and the death penalty policies in contemporary Chinese penal history. A question which has not yet been answered is: does the over reliance on capital punishment today have its roots in China's feudal and Republican past? Alternatively, is this high punitivity new under communist rule, a total break from the past? The research in this chapter has shown that some, but not

all of the essential traits of contemporary practice developed at a much earlier time in history. That is to say, many aspects of the administration of capital punishment in today's China have their roots in the country's complex history.

It appears that traditional practices have found expressions in contemporary capital punishment institutions in China. For example, the practices of re-examining the merits of capital cases by the highest judicial authority and even by the emperor himself (MacCormack, 1996: 129-140; Bodde and Morris, 1967: 42) in most dynasties closely resembles the contemporary Chinese practice of having capital cases reviewed by the SPC. The two-pronged scheme of 'immediate execution' and 'execution after the assizes' was, arguably, an early form of the contemporary dual system of 'immediate execution' and 'suspended death' (Bodde and Morris, 1967: 42, 92-92, and 131-143). Even the reform initiatives exempting juveniles¹² and the aged¹³ from the death penalty in criminal law in 2010 were a traditional practice (MacCormack, 1990: 110-114).

Indeed, while China observers write about the strong cultural continuity throughout Chinese history, legal historians are amazed at the continuity of Chinese imperial legal culture (Sharp, 1962; Kulp, 1930). For instance, based on a comparison of the content of legal codes from the seventh to until the twentieth century, MacCormack noticed that 'not only is the substance of many provisions identical but even the formulation is virtually the same' (MacCormack, 1990: 290). E Alabaster also mentioned in passing in an analogy between imperial Chinese law and the Law of

¹² The 1997 Criminal Law and Article 44 of the 1979 Criminal Law, article 49.

¹³ The Eighth Amendment to the Criminal Law, article 1.

Rome, that Chinese law has moved slowly 'in a straight line', compared to the change of legal thoughts and ideas in other civilised countries (Alabaster, 1899: 613-614). The same largely holds true for the evolution of penal culture from imperial eras to Republican, and even the Communist, China. Klaus Mühlhahn observed that 'the history of criminal justice and legal punishment in China does not at all support the concept of a clean break between old and new, tradition and modern'... 'it is remarkable how many elements of the imperial penal system continued to play out during the larger part of twentieth-century China'(Mühlhahn, 2009: 287). It could be argued that, in many aspects, the continuity in penal culture tied the contemporary Chinese practice to its legal tradition.

Recognizing the feature of penal continuity, however, does not necessarily mean accepting that there has been a causal link between penal tradition and the extensive use of capital punishment at present, in spite of the strong temptation to establish such a correlation. We have established in this chapter that most of the past penal traditions that weigh heavily upon present practices aimed to restrict rather than expand the use of capital punishment. Indeed, if a conclusion were to be made that capital punishment as administered in the past still influences the minds and behaviour of people today, it should at least include an argument against over-reliance on capital punishment. Eccentricity in alien cultures and traditions always excites the anthropological mind. For Chinese officials and politicians, the logic that 'we have intrinsically different culture' provides a sound justification for China's excessive use of capital punishment. Yet the differences in penal cultures between China and the West, on the level of penal cruelty and ruthlessness as well as

regarding the philosophical grounds justifying the use of penal sanctions, may be less than assumed.

First, those unfamiliar with Chinese culture and traditions may find themselves preoccupied with impressions of China's excessive and barbaric use of capital punishment. Western, and even some Chinese observers, searched for evidence that imperial Chinese penal culture had a unique taste and even fetish for death, blood and bodily cruelty. Nevertheless, Chinese legal tradition was not singularly cruel. In comparison with other civilised systems of law worldwide, traditional Chinese penal law has no peculiar taste for heavy punishment. Even a cursory examination of the penal codes of all dynasties challenges the assumption that traditional Chinese penal law has a particularly strong appetite for the death penalty. The number of capital offences in most Chinese imperial codes remained under 300¹⁴ at a time when that figure was not much lower under the Bloody Code in 18th century Britain¹⁵.

Throughout the imperial Chinese history, there were various periods when the number of capital offences was even lower than the current figure in the Criminal Law of the People's Republic. For instance, penal statutes in Tang dynasty¹⁶, near

¹⁴ The death figure from Tang dynasty until Ming dynasty has remained under 300. The only exception during imperial era was Qing, when capital offences totalled 813. However, this surge may be either a result of proliferation of sub-statutes or a different method of calculation, or both. See (Bodde and Morris, 1967: 102-103).

¹⁵ It seems that scholars have not reached consensus on the number of capital offences during the 18th century in Britain. It is believed by some that the figure exceeds 300 while others argue that the number of capital offences was 222. (Randa, 1997; Editorial, 1965)

¹⁶ The late Qing jurist Shen Jiaben noted that, even as early as the Tang dynasty (8th century), Xuanzong emperor once abolished the death penalty. See (Shen, 1985)

the end of Qing (1905-1910)¹⁷, the Beiyang government (1911-1928)¹⁸, and Republican China under the rule of Nationalists (1928-1948). For instance, the execution figures back in the Tang dynasty were surprisingly low - only 29 prisoners were condemned in 630 A.D. and only 58 were sentenced to death in the year 737 A.D. (Shen, 1964a: 381). With the influences of Confucian humanitarianism¹⁹, efforts to reduce the use of capital punishment, in particular relatively fair procedures of capital adjudication²⁰, were evidenced by the mechanisms of amnesty as well as Assizes, and the humanistic exclusion of vulnerable groups from executions as provided in the meticulously drafted penal codes. Compared with harsh penal practices common to Feudal Europe prior to the 18th century - such as burning at the stake, scaffolding, breaking on the wheel, keelhauling, drawing and quartering - criminal proceedings in imperial China, at least in some respects, were relatively civilised and lenient (Shapiro, 1990: 26-30; Bodde and Morris, 1967: 41-42; Mühlhahn, 2009: 40-41; Chung-Hui Wang, 1918-1919), and the horrible spectacles of 'death by a thousand cuts' were not uniquely excessive.²¹

Second, a utilitarian penal philosophy based on deterrence (Bodde and Morris, 1967: 99-100) and retribution, the main theoretical foundations of Chinese capital

¹⁷ At the beginning of the 20th century, the number of capital offences was unprecedentedly low after the Xinzheng reform. For instance, the New Penal Code of the Great Qing, drafted in 1907 and published in 2010, pronounced a substantial decrease of the number of capital offences to over 20. The Provisional Criminal Code of the Republic of China (1922) only prescribed 31 capital offences.

¹⁸ See Appendix II: Death Sentences and Executions by Beiyang Government.

¹⁹ Life exile, for example, was originally introduced as a commutation of the death penalty for specific offences. See (MacCormack, 1990: 101; McKnight, 1981; Bodde and Morris, 1967: 41-43, 82-83 and 31-132).

²⁰ For example, Kang xi emperor in the Qing dynasty said nothing caused him more distaste than the final ratification of a death sentence. See (Spence, 1975: 29 and 32; MacCormack, 1996: 129-131).

²¹ Even in the mid-18th century, for a minor assault on the person of Louis XV, Francois Damiens was dismembered in public in the most gruesome way. See (Foucault, 1995). Moreover, punishing the defender with the death by a thousand cuts was believed to be more on a religious note rather than purely inflicting pain. See (Brook et al., 2008: 203-221)

punishment law, did not stop the Chinese practice shifting away from a heavy reliance on capital punishment during some historical junctures. The argument that the current capital punishment regime is determined by historical factors is manifestly insufficient to explain various aspects of China's contemporary capital punishment practice. For instance, it was alleged that retributive-based justification such as 'an eye for an eye' and deterrence-based belief in the necessity of effect such as 'governing with harsh punishment'²² in the imperial era was inherited by policy makers in Communist China. In particular, imperial-era proverbs such as 'governing with harsh punishment during tumultuous times' was allegedly the conventional wisdom which inspired the launch of Strike Hard Campaigns in the 1980s. Moreover, the belief in retributive values of capital punishment by the general public and the belief in the deterrent effect of capital punishment by ruling elites have been widely cited by legal professionals as a rationale for the status quo of China's capital punishment policies today.

Admittedly, utilitarian approaches to law loomed large in Chinese history (Ocko, 2000; Keith, 1994: 218-221; Liang, 1989: 89). It is true that there was a profound utilitarian tradition in China of deterring crimes 'appropriately' and meticulously with penal sanctions as a means to better social control. Moreover, there is widespread retributive conviction among the commoners in China in the past, and today, in certain categories of criminal cases. Admitting these facts, however, does

²² For instance, a legalist philosopher and a well-known politician, Shang Yang (390-338 B.C.), wrote that 'there is no better means of prohibiting wickedness and stopping crime than by making punishments heavy. If punishments are heavily and rigorously applied, the people will not dare to try...there will be no people punished...if people understands punishments, there is no capital punishment.' See (Duyvendak, 1928: 35-40)

not necessarily lead to the conclusion that a heavy reliance on capital punishment today is a product of penal tradition.

However, there are also many counter-arguments against the temptation to build a causal link between traditional penal philosophy and contemporary practice. First, deterrence and retribution-based theories are hardly a characteristic of the Chinese society or penal culture. Rather, it is a penal theory shared by societies around the world over extremely long periods of history. There is ample evidence of the prevalence of the retributive and deterrent theories in Western criminology and criminal justice writings, challenged, and rejected by some, during modern times.

Moreover, many Chinese jurists, philosophers and even politicians in history believe that penal punishments should not aim to deter or incapacitate criminals in an unwarranted fashion. As early as 6th century B.C., Laozi, a Taoist philosopher, questioned the deterrent theory, asking ‘when normal, decent people don’t fear death, how can you use death to frighten them?’ (Le Guin, 1998: 107) A few Tang emperors living in the 8th century, including Xuanzong, Suzong and Xianzong, arguably were abolitionists rather than supporters of deterrence theory. As for arguments against retribution, even for crimes such as homicide, under certain circumstances, capital punishment might be the subject of monetary redemption in imperial times (MacCormack, 1990: 105-108) and today²³. Certainly, the current popular demand for retribution is not equally high for all fifty-five capital crimes that remain on the

²³ In these capital cases, courts will reduce immediate execution to suspended death after deciding that both parties have achieved reconciliation, if the victims or their family forgive and pardon the defendants who admit committing crimes, apologize and offer compensation to the victims or their family. See (Han, 2009; Sun, 2010: 180).

books. In early 2012, the public outcry of sparing Wu Ying, a businesswoman charged with financial fraud, from the death sentence (Demick, 2012) indicated that the Chinese public has no deep-seated, undiscerning retributive beliefs in capital punishment.

Conclusion

The aim of this chapter has been to trace and outline the evolution of the Chinese death penalty system in pre-Communist China. It is argued that it is far from clear that the Chinese imperial capital punishment regime was uniquely cruel and barbaric. Even a brief survey of the imperial legal codes and practices in this chapter have found plentiful evidence supporting the idea that although the Chinese death penalty system was deeply entrenched in imperial penal law and practices, there were numerous sophisticated and refined mechanisms designed by imperial legislators to protect defendants from arbitrariness and miscarriages of justice in state killings.

In the opening section of his book *Discipline and Punish*, Michel Foucault describes the execution of Robert Francois Damiens in 1757. The horrifying execution lasted some days and involved various sorts of burnings and an unsuccessful attempt to have the living body torn to pieces by a horse. In comparison, the most barbarous practices of Chinese state execution at that time was at most equally – if not less – ferocious than the judicial killings administered in eighteenth-century France. Even the most ignominious form of execution in Chinese penal history – death by slicing – was not much more painful than the half-hanging, disembowelling and final quartering, practised in England in the past (Alabaster, 1899: 58). In fact, the

imperial Chinese legal system has a kind of due process which, although not free of flaws, 'deserves admiration and respect' (Bodde and Morris, 1967: 142).

In particular, there are so many aspects of the imperial death penalty regime that were heavily influenced by the Confucian humanitarianism that were extremely lenient in comparison to the capital punishment practices and laws elsewhere in the world in ancient times. It is true that the imperial capital punishment regimes were subject to the influences of both Confucian values and Legalist thoughts. Legalist thinking encouraged imperial rulers to punish the wrongdoers with the harshest penal sanctions and yet supported the drafting of the most sophisticated penal laws and establishment of elaborate penal institutions. Confucian values nurtured the development of the lenient side of the imperial capital punishment regimes and fostered the establishment of a series of mechanisms – such as exempting vulnerable groups from executions, establishing and developing the Assize systems, as well maintaining amnesty systems in different dynasties – to moderate and civilize the harshness of capital punishment law. These ancient legacies endured some relevance not only for the research on practice in the past, but also for an analysis of contemporary Chinese death penalty practice. In fact, it seems that these imperial legacies inspired the Chinese reforms of capital punishment in the 21st century.

It seems interesting that the evolution of capital punishment law and practice in imperial China has manifested a pattern different from the general trend towards civilization and moderation as observed by Durkheim. Specifically, the number of capital offences in law increased, over the latter imperial dynasties; in practice, a crueller method of execution was introduced and institutionalised into capital punishment regimes after the Tang dynasty. The toughening up of capital

punishment policies towards the end of the imperial era was probably motivated by practical considerations – the political need to govern the country with punitive measures during chaotic times as well as increasing the level of penal severity to compensate the diminishing institutional capacity of imperial penal machinery as a short-run measure of expediency. In essence, the death penalty regimes in imperial times were tools of deterrence and retribution for imperial rulers.

Chapter Two. A Brief Survey of Capital Punishment Law and Policies in Communist China

Introduction

The main purpose of this chapter is to outline the evolution of capital punishment in China over the second half of the 20th century. This part of penal history in China, which is the focus of this chapter, can be roughly divided into two periods: the first three decades (1949-1979) and the Strike Hard era or the Deng-Jiang era (1980-2003). This is because the succession of political power has a great impact on the patterns and approaches of the use of capital punishment. The last period of contemporary penal history of the PRC – the Hu-Wen era (2004-2012) – saw a series of reform initiatives aimed to regulate and curtail the use of capital punishment, which will be discussed in greater detail in the next chapter. Section one of this chapter briefly surveys capital punishment policies and practices in communist border regions before 1949 as this is the true origin of the contemporary penal practice in mainland China. It demonstrates that, from its origins, lying at the heart of capital punishment policies was an instrumental view. As a result, depending on the changing external military environment of the communist-controlled areas and the shifting political needs and priorities of the Party – to repress counterrevolutionaries during class struggles harshly or to win broad political support across different social classes – the use of capital punishment fluctuated between extremes of harshness and leniency.

The second section explores the use of capital punishment in post-1949 China and shows that the vacillating pattern in the use of capital punishment continued to exert influences. Capital punishment law and policies under the rule of Mao Zedong were the outcome of the tensions between different political factions within the political leadership who held vastly different views towards the use of capital punishment. State-sponsored killings peaked during Mao Zedong's mass-line political campaigns, declining during intermittent periods between these campaigns. Most notably, during the Campaign to Suppress Counterrevolutionaries from 1950 to 1953 alone, 710,000 counterrevolutionaries were executed (Ma et al., 1989: 55). This contrasts with the relatively smaller-scale and lower-volume judicial executions in the first half of the 1960s. According to a tally kept by Western journalists based on regular governmental announcements in provincial newspapers, the total varied from eight to twelve per month, mostly cases of Nationalist spies (Snow, 1962: 347).

Towards the end of the 1970s, a new 'reform and open-up' policy replaced political campaigns as the official national policy under the rule of Deng Xiaoping. Fear of social disorder and political instability began to loom large on China's political as well as penal policy making landscape with the market capitalization process. Strike Hard Campaigns (*Yanda* Campaigns)²⁴ – in particular the first round taking place in the early-mid 1980s – led to sharp increases in the number of death sentences and executions, as well as relaxation of due process procedures (Tanner, 1999: 93-99; Trevaskes, 2008: 395-397). During the first year of the 1983-87 Strike-Hard campaign

²⁴ To distinguish the general patterns of China's use of capital punishment during its various historical periods, I hereby arbitrarily divide the contemporary Chinese penal history into three stages: the Maoist era (1949-late 1970s), the Deng-Jiang era (late 1970s- early 2000s), and the most recent era under the Hu-Wen administration (early 2000s-2012).

– the most intensive infliction of state-sanctioned deaths since the 1950 Campaign to Suppress Counterrevolutionaries – 24,000 offenders were sentenced to death and 1,027,000 were convicted of criminal offences (Ma et al., 1989: 525). Again, the volume of executions in non-hard-strike periods was relatively low and capital offenders were afforded stronger due process safeguards.

Therefore, it seems that the use of capital punishment during the first three decades of contemporary penal history under the Maoist rule and the ensuing two decades of Strike Hard Campaigns can be characterized by a fluctuating pattern between extremes of harshness and relative leniency. This pattern of ebb and flow can be explained partly by the constant tension between a utilitarian view that the death penalty is an expedient instrument to achieve short-term political goals and a stricter adherence to the rule of law, penal regulation and due process when dealing with capital cases. Although drafters of China's 1997 Criminal Law took a first step to restrain the wanton use of capital punishment during the Strike Hard era (Davis, 1987: 312-313; Cai, 1997: 217-218), it was not until 2004 that a series of reforms of capital punishment were planned and prioritized by the SPC.

Section One. Pre-1949 Era: the Origins of Contemporary Communist Capital

Punishment Practices

Available evidence suggests that capital punishment policies of regional communist regimes before the founding of the PRC were constantly changing. Specifically, capital punishment law, practices and policies oscillated between two extremes of the spectrum – leniency and harshness (Griffin, 1976). The early years of Communist

regimes saw harsh penal policies targeting political enemies²⁵— not merely evil gentries, landlords and agents of Nationalist regimes – thousands of communist cadres themselves were also executed during campaigns of suppressing counter-revolutionaries in most of the border regional regimes.²⁶

Despite harsh war justice in early periods, however, a trend towards moderation subsequently developed within the communist penal regime. Capital punishment policies in a relatively stable era (1937-1949) of the Shan-Gan-Ning Border Regional Regime, for instance, were restrained.²⁷ Usually, the vast majority of captured counter-revolutionaries and class enemies were spared and subject mainly to education and criticism during this period (Brady, 1982: 66). In 1939 and 1940, Shan-Gan-Ning border regional authorities meted out 83 and 46 death sentences respectively (Ai, 2007: 101; Chinese Academy of the History of Anti-Japan War, 1995: 319). The number of death sentences in these two years counted for merely 5.5% of a total 2,347 criminal cases (Archives Office of Shanxi Province, 1988b: 227). In a three-month period from December 1940 to February 1941, the border region judiciary imposed only one death sentence out of 21 criminal cases (Archives Office of Shanxi Province, 1988a: 302). From October 1948 to June 1949, there were only

²⁵ For instance, an unconfirmed source reported Communist Hai-Lu-Feng Soviet Government allowed peasants execute 1,822 landlords within a few months. It was also reported that peasants were allowed to maltreat and execute counterrevolutionaries at will during this period. See (Leng, 1967: 2-13)

²⁶ See (Zeng, 2004). For instance, Baiqueyuan Cleansing of Counterrevolutionaries in 1931 eliminated more than 2,500 Red Army military commanders, 60%-70% of whom were arrested and executed in Hubei-Henan-Anhui Revolutionary Base Region. More than a thousand communist officers were executed in West Hunan-Hubei Revolutionary Base Region in Suppression of Counterrevolutionary Campaigns.

²⁷ According to Lei Jingtian, the then president of the High Court of Shan-Gan-Ning Border Region, defendants were sentenced to death only in extremely exceptional circumstances. See (Lei, 2007). Another example is that in 1928 Mao Zedong exhorted that the communist penal law should only condemn those who have committed the most egregious atrocities and owe ‘blood debts’ to the people. See (Zeng, 2004: 41-42)

114 confirmed death sentences (Anonymous, 1995: 19) granted by the Northern China People's Government²⁸.

On the one hand, the communist penal practices turned out to be particularly sensitive to the external military and political environment. During chaotic times when the political rivalries between Communist and Nationalists intensified, the need to fight political enemies rose, peace and stability – which were essential conditions for the rule of law – became scarce, penal policies toughened up. Similar trends can be found during the era when the military clashes between communist armies and Japanese military forces broke out. In contrast, when the external political and militant atmosphere alleviated, communist penal policies moved to the lenient end of the continuum. This may explain why the number of criminal cases in 1940, when Communists and Nationalists formed a unified front to combat Japanese oppression, dropped by 57% as compared with the year of 1938 (Leng, 1967: 13). In fact, communist penal laws dealing with traitors during this Communist-Nationalist United Front period were even more lenient than Nationalist legislation in some respects (Griffin, 1976: 75-82).

For the same reasons, there were significant variations in capital punishment trials and review procedures under the communist regimes throughout the 1930s and 1940s. For example, although approval from communist governments or higher judicial authorities was required before executions in various regional regimes from

²⁸ Northern China Government consolidated two existing border regional regimes - the Shanxi-Chahar-Hebei border regional government and the Shanxi-Hebei-Shandong-Henan border regional government.

1930 to 1933²⁹, as the war against Nationalist army intensified, county-level adjudication departments were authorized to sentence and execute counter-revolutionaries on the spot. Only post-execution reporting to higher authorities was a requirement (Zeng, 2004: 214-215; Griffin, 1976: 47-49; Lötveit, 1979: 118). Review procedure in capital cases, nevertheless, was re-introduced into penal statutes under the Shan-Gan-Ning Border Regional Government, when Nationalist-Communist Unification was temporarily established (Yang and Fang, 1987: 164; Ma, 1955).

On the other hand, internal factors, in particular the political needs of confirming and augmenting the legitimacy of the Communist Party of China (herein after CCP) through responding to popular demands, help to explain the excessive use of capital punishment during the early years. Evidence in support of this includes the *ad hoc* nature of people's tribunals and courts, the prevalence of popular justice, elimination of judicial independence³⁰, decentralized penal power, etc. during the high tides of political campaigns (Leng, 1967: 1-26; Buxbaum, 1966: 341-371; Griffin, 1976). The enactment and implementation of communist capital punishment policies and legislation during those years, therefore, was contingent on both external and internal factors.

²⁹ The Provisional Penal Code of the North-east Jiangxi Soviet which was published in May 1931, for instance, required that capital sentences must be submitted to the People's Committee for review before execution. In 1930, The Judicial Regulations of the West-Fujian Soviet demanded that in principle, sentencing and executing prisoners should be reported to county governments beforehand. After a bloodshed in Jiangxi from the cracking down of AB League members, the Zhong Hua Soviet regime provided that county-level judiciaries had no jurisdictions on capital cases in the Provisional Procedures on Dealing with Counterrevolutionary Cases and Establishing Judiciaries in December 1931. In April 1933, it was required that all capital defendants were allowed to appeal to the central Provisional Supreme Court after appellant procedure at the provincial level. See (Zeng, 2004; Han and Chang, 1981).

³⁰ The communist authorities made no pretence of judicial independence in its early years. It was agreed in 1944 that 'the separation between judicial and administrative branches is meaningless', judiciary should be led by the government and that judicial independence is a dangerous tendency that should be corrected. (Lin, 1988: 22)

Available data are insufficient for one to make a solid claim that Nationalists were less preoccupied with capital punishment than Communists during that period. Not only are data on death sentences and executions on both sides from 1928 to 1949 incomplete, but indirect evidence has already suggested that there might be a hidden number under military laws and from extrajudicial killings by the Nationalist government.³¹ However, the approaches of Communists and Nationalists to capital punishment in particular and to law in general seemed to be qualitatively different. Admittedly, no evidence suggested that Nationalists had a heavy reliance on the use of capital punishment within its lawfully-established criminal justice system.

Following the *Xinzheng* legal reform aimed to modernise and moderate China's penal system, the Beiyang rulers and Nationalist jurists continued to bring Chinese penal systems closer in line with European-American standards. As a matter of fact, penal codes in the Republican era borrowed heavily from the New Penal Code of Great Qing, which strictly restricted the use of capital punishment in law and practice. Criminal justice was administered by Nationalist legal professionals who also showed deference to mainstream international influences.

Early communist criminal justice, however, was administered by judicial and political cadres, who lacked sufficient legal knowledge or training. The communist

³¹ Extrajudicial killings of communists and peasants, carried out under martial law, frequently occurred during the Nationalist 'cleansing up' during the five anti-Communist expeditions and during civil wars. For instance, more than 1,000 peasants were shot or buried alive within one month at a small county by agents of the Nationalist government in the second civil war, and 7,000 people lost their lives during a cleansing campaign by Nationalists in half a year. See (Fang, 1946; Mao, 1927; Xinhua News Agency, 1947). Moreover, during the republican era, trials and executions of robbers and bandits were under military law instead of formal court systems. Thus, the execution figures recorded by the Ministry of Justice may not include these summary executions of robbers and bandits. See (Xu, 2008: 277-301).

penal system established on the basis of home-grown experience and the wisdom of the masses at the grassroots level – mainly peasants and workers – was partially infused by Soviet practices and ideologies. In comparison with Nationalists' alliance with Europeans and Americans, Communists had weaker ties with mainstream international society. The origins of the early-day communist penal system could be characterised as pragmatic, flexible, proximate to politics, and highly sensitive to popular opinion. Many of these traits and features continued to influence contemporary capital punishment practice in the PRC. Most importantly, lying at the heart of the penal policies and practices in the early era of the communist regimes was an instrumental approach to penal sanctions and capital punishment. Most political leaders, including those who were directly charged with responsibilities of overseeing the administration of penal justice, saw penal sanctions as a means of achieving ever-changing political demands and ideologies.

In sum, the period of the early communist rule before the founding of PRC saw communist death penalty policies and practices fluctuating between a radical and populist approach, which featured large-scale public trials, summary justice, frequent and even public executions and relatively restrained use of capital punishment and greater emphasis placed on legal rules, procedures and institutions. Capital punishment was heavily relied upon by the authorities to dispense revolutionary justice, eliminate counterrevolutionaries, and strengthen political control during the extremely violent periods of war and class struggles (Palmer, 1996: 110; Griffin, 1976: 4; Leng and Chiu, 1985: 26).

Section Two. The Post-1949 Death Penalty System under the Rule of Mao

After the establishment of the People's Republic in 1949, the populist, mass-line, revolutionary approach to justice which was established during the early Communist regimes continued to dominate the administration of penal justice. Meanwhile, the legal authorities also looked to the former Soviet Union for a successful and durable model of legal system – and particularly a regime of criminal justice – in response to the practical need for formal legal rules and institutions to maintain social stability and to govern a large population. Additionally, the administration of the death penalty inherited some of the concepts and approaches from imperial and Republican eras, despite the intentional abolition of legal Codes and institutions in Republican China following the state making in 1949. Thus, the Chinese capital punishment policies and practices, as well as other aspects of the legal system, were shaped by the multiple sources of influences, and by the first two in particular.

The criminal justice system in the era of liberation and restoration of the state economy in Communist China (1949-1953) was mostly driven by political agendas and communist ideologies. As such, the death penalty was adopted as a mechanism to achieve socialist ideals, to enhance the political awakening of the masses, to heighten the powers of the state, to develop social confidence in the legitimacy of its new government, and to restlessly eradicate 'class enemies' who politically disapproved of the revolutionary ideologies and policies (Boxer, 1999: 600-601; Cohen, 1968: 9). As a criminal law scholar in the 1950s put it, '[I]t can be seen that the death penalty as a punishment in our country is a necessary means to suppress

the resistance of domestic and foreign enemies and to protect the interest of the state and the people. To use the death penalty is not only necessary but also just. One cannot confuse our country's death penalty with that of the exploiter countries and discuss them as if they were the same.' (Cohen, 1968: 536)

The politicized, populist, informal administration of capital punishment, nevertheless, was paralleled by attempts to enable fairer application of the law and better procedural safeguards. Juxtaposition of both trends was evident in the legal provisions with respect to approval and review of capital cases. Specifically, Article 7 of the General Rules for the Organization of People's Tribunals (1950) provided that provincial people's governments and provincial-level High Commissioner's Office had the authority to approve the death penalty (The State Council of the People's Republic of China, 1950). Article 8 of the same General Rules, however, deprived the counterrevolutionaries of their right to appeal. Paragraph 4 of the Instructions Relating to the Suppression of Counterrevolutionary Activity (1950) stated that 'wrongful executions should never occur' and that the capital cases must be submitted to the head of provincial-level government or high commissioners for approval before executions. However, it was also provided in the same article that this procedure of approval should be 'convenient and swift' (The Central Committee of the Communist Party of China, 1950).

The Provisions Concerning the Establishment of the People's Tribunals for the 'Three-anti' and 'Five-anti' Movements (1952) prescribed capital convictions must be submitted to provincial people's governments for review and to the Grand Administration Region Government or the central government for approval (The

State Council of the Central People's Government, 1952). Article 11, paragraph 5 of the Law for the Organization of People's Courts of 1954 prescribes: 'If a party does not accept the judgement or order of last instance of an intermediate people's court or a high people's court in death penalty cases, he may apply to the people's court at the next higher level for review. A judgement of a basic level people's court and a judgement or order of an intermediate people's court in death penalty cases shall, if the party does not appeal or apply for review, be submitted to the high people's court for approval before execution.' (Cohen, 1968: 536-537)³²

Despite the explicit and continued politicization of the administration of capital punishment, a brief review of the legal provisions with regard to the review and approval procedures in capital cases over the first four years of the young PRC shows improving procedural fairness and greater attempts made by the politico-legal authorities to eliminate wrongful executions and convictions. These mechanisms and policies hold particular importance because they set the stage for the contemporary mechanisms of capital punishment review. It was also during this period that the legal authorities for the first time created a scheme of 'sentencing (the prisoner) to death, suspending execution of sentence for two years, compelling labour, and observing the consequences', in order to give those who are sentenced to death a chance to reform and repent within a two-year testing period (Cohen, 1968: 537). If the prisoner's behaviour in this period indicated his sincere repentance and reform, his death sentence could be reduced accordingly to life imprisonment or even long-

³² Other relevant regulations of the purpose of sanctioning sentences of death included the 1951 Law for the Punishment of Counterrevolutionaries, the 1951 Provisional Law on Guarding State Secrets, the 1951 Provisional Law on Penalties for Undermining the State Monetary System, the 1952 Law on Penalties for Corruption, etc. See (Palmer, 2007: 112).

term imprisonment. This scheme was believed by the authority to reflect a high degree of the spirit of ‘revolutionary humanitarianism’ and leniency.

Evidence shows that the harshness and arbitrariness of the legal process dealing with capital cases was diluted by other procedural safeguards afforded to capital defendants in the 1950s. For example, the death penalty was not applicable to pregnant women or to minors save for extreme circumstances during this period.³³ There was also a special amnesty granted to the suspended death sentence.³⁴ A political leader of the Party-state, Liu Shaoqi, once commented that the application of the death penalty was just supposed to be a temporary criminal justice policy before its final abolition and the review power of all capital cases should be reserved to the top tier of the judiciary, i.e. the SPC, in 1956. The following remarks regarding the death penalty were made by Liu Shaoqi during various occasions.

The death penalty is strictly reserved to the criminals of the worst kind who has caused public moral outrage. Criminals other than those mentioned above should not be punished by death and should be treated with humanitarianism. (Liu, 1985: 254)

³³ The Department of Justice of the former East China Military Government Council in its Reply to the People’s Court of Fukien Province Relating to Methods for Sentencing Pregnant Women to Death and for Pronouncement of Execution of Sentence, which was approved by the Ministry of Justice, pointed out: “For the protection of the life and normal development of the child in the womb a criminal who is pregnant generally shall not be sentenced to death. If death alone can pacify the people’s anger, it [the death penalty] shall be pronounced one year after the birth of the child, and shall be executed [only] in accordance with certain procedures” in (Cohen, 1968: 538).

³⁴ The Special Amnesty Order of The Chairman of the PRC (promulgated on 17 September 1959), article 5.

Any case belonging to [the category of] required death penalty cases should be decided by judgment of or approved by the Supreme People's Court. In this way, we will gradually be able to achieve the goal of abolishing the death penalty. (Liu, 1985; Cohen, 1968: 538)

This said, the overall administration of capital punishment and penal justice in Maoist era was highly politicized, particularly populist and essentially informal. Little efforts were made by the politico-legal authorities to draft a formal penal code for the new PRC until 1979.³⁵ Mao Zedong ruthlessly supported punishment of political enemies with the Legalist, punitive approach to penal justice, endorsing a complete abrogation of the so-called 'obsolete' legal heritages from feudalist China and the Nationalists. Meanwhile, he strongly disapproved of the sophisticated codification of laws and establishment of legal institutions, which were important characteristics of Legalism in the imperial era. As such, Maoist penal ideology represented the worst combination of lawlessness and punitiveness, rarely seen in either imperial or Republican history. Under his influences, continuous efforts made to draft and revise penal codes in the 1950s and 1960s (Lu and Miethe, 2007: 45; Tanner, 1999: 6-8) failed to bear fruit with the advent of the Cultural Revolution (1966-1967). With the demolition of judicial apparatus by Mao and his supporters, the death penalty regime in this chaotic era was fraught with mass trials and

³⁵ There were several types of capital crimes provided by government decrees, special directives and administrative orders: 1) crimes which have caused the death of a citizen, 2) murder or assault with intent to kill motivated by class hatred, or violence of an especially cruel nature, 3) rape, of a victim under the age of fourteen, and 4) a variety of counterrevolutionary crimes (Snow, 1962: 352-354). Also see, the Act of the People's Republic of China for Punishment of Counterrevolution (approved at the 11th meeting of the Central People's Government (20 February 1951), promulgated by the Chairman of the PRC, Feb. 21, 1951), Articles 3-13, and 15.

summary executions; certain long abolished execution methods resurfaced, such as beating and exposure of the corpse (A Yi, 2008).

Section Three. China's Death Penalty Regime in the Strike Hard Era

The decade of brutal chaos during the Cultural Revolution, which delegitimized all forms of authority in politics, culture and law and encouraged destructive violence (Tu, 1996; MacFarquhar and Schoenhals, 2006), posed serious challenges to the authority, ideology and legitimacy of the CCP (Wang, 2008b: 788; Chen, 1997: 423). Although China's political system did not abruptly collapse as had happened in the Soviet regime, the professional, bureaucratic criminal justice administration – which was supported by Liu Shaoqi and his followers from the mid-1950s to the mid-1960s – was almost completely demolished during the Cultural Revolution.

After the resignation of Hua Guofeng, the first post-Mao President of the PRC who firmly believed in and insisted on implementing Maoist economic, political and legal policies, there remain fundamental divisions between the political 'twin towers' within the Party over *how* to achieve economic development and *whether* to embark on political reform (Yang, 2010). The 'liberal' camp, headed by Deng Xiaoping, supported economic marketization and opening up to the rest of the world. Further political liberalization was also contemplated by this camp. The 'conservative' camp, led by Chen Yun, admired the Soviet model, insisted on a centrally-planned Leninist economy, and held significant reservations regarding market reform and political liberalization (Yang, 2010; Zhao et al., 2009; Zhao, 1993). The compromise of the

two camps enabled China to reform its economy while the contradictions between them further complicated the tensions within the politico-legal leadership in Maoist era.

The post-Mao economic and political policies were essentially outcomes of the conflicts and compromises of inner-Party political struggles (MacFarquhar, 1987), as were the penal policies. With a fresh memory of and a deeply embedded fear of lawlessness from the chaotic Cultural Revolution era, Chinese citizens aspired to a strong government and regular legal regime that was able to maintain law and order. This said, the penal policies and practices in this era were by no means clear-cut departures from past, Maoist approaches. The two competing forces dominating the penal system – the populist, mass-line, informal way of justice administration and a model emphasizing formal legal institutions and codified legal codes – continued to shape capital punishment policies and practices in China's post-Mao era, despite incremental and subtle changes to the balance of power between the two.

Chinese Capital Punishment Laws under the Deng-Jiang Rule

There appeared to be no significant disagreements between the two political factions (Deng *versus* Chen) on using harsh penal sanctions, including capital punishment, to govern Chinese society. After all, they both agreed upon a 'politically-conservative and economically-liberal' path of development for post-Mao China, which requires the establishment of a modern legal system to protect the nascent interests and aspirations generated by economic reforms, as well as the employment of harsh

penalties to solve emerging social problems. In this context, proposals on the development of a modern legal system, which were once discussed during the mid-1950s and silenced by subsequent political campaigns, came back to life towards the end of the 1970s.

In a departure from Maoist legal nihilism (Keller, 1994: 714; Dutton, 2005b), the Chinese state launched a series of reform attempts to 'govern the country with law'. Extensive legal institutions were built and developed, a flood of legislation, administrative regulations and local enactments were promulgated, millions of judicial cases annually were heard by courts nationwide, legal education for students and legal training for judges thrived, and there was an emerging general consciousness for using law and legal institutions to resolve disputes and uphold personal rights (Potter, 2004: 466; Lubman, 1999: 3). As a result, capital punishment policies and practices in the era of Deng Xiaoping stood in contrast with Mao's years as the once fuzzy boundary between judicial and extrajudicial killings became clear and extrajudicial executions became rare (Johnson and Zimring, 2009: 263).

As such, the establishment or restoration of penal apparatus under the rule of Deng Xiaoping was rapid progress: the people's courts, responsible for the adjudication of capital cases, along with the people's procuratorates which press capital charges, the highest state organ of 'legal supervision', and the public security bureaus, the police, constituted the three major legal authorities charged with the administration of capital punishment. As regards capital punishment law-making, the Second Session of the Fifth National People's Congress in June-July 1979 passed two

penal statutes – the 1979 Criminal Law³⁶ and the 1979 Criminal Procedural Law. This legislative move was considered to be of landmark significance in China's penal history. For the first time, rules relating to the administration of penal justice, which were previously governed by various administrative order, government decrees and even social customs, were systemically codified, formalized and regulated to form part of the 'Socialist Legal System with Chinese Characteristics' (Mao, 2008). The codification of penal codes, among the other legislative efforts, was considered not only as an important step towards the establishment of the rule of law, but also a sign that Chinese politico-legal authorities were bringing in their practice in line with Western, modern standards.

The 1979 Criminal Law proscribed 28 capital crimes, among which 15 were counterrevolutionary offences (see Table 2.2 in the Appendix). Other capital offences under this statute included eight offences for endangering public security, three offences for the infringement of personal rights, and two property offences. In less than two decades of campaign-style crime control from 1981 to 1997, 24 special criminal ordinances were issued, increasing the total number of capital crimes to 74 in 1995.³⁷ Chinese scholars have described this dramatic increase as the most 'rapid legislative expansion of capital offences' (Chen, 2005a: 520). During the decade from 1981 to 1991, an average of 4.2 capital offences were added into law per year, indicating a dramatic proliferation of capital punishment legislation. On the other

³⁶ Criminal Law of the People's Republic of China, adopted at the Second Session of the Fifth National People's Congress on July 1, 1979, promulgated by Order No. 5 of the Chairman of the SCNPC on July 6, 1979, and effective as of January 1, 1980 (Hereinafter the 1979 Criminal Law).

³⁷ The fifteen 'counterrevolutionary crimes' which were subject to the death penalty in the 1979 Criminal Law were removed from the 1997 Criminal Law.

hand, the 1979 Criminal Law excluded vulnerable groups including juveniles from the scope of by immediate execution. These groups, nonetheless, were still subject to suspended death penalty.³⁸

The second criminal code in the penal history of the PRC, the current criminal code in force, is the 1997 Criminal Law. It retained most of the capital offences in the 1979 Criminal Law and included a range of legal rules with regards to the death penalty as prescribed in specific penal ordinances issued during from 1979 to 1997. As a result, the number of capital offences in the 1997 Criminal Law rose to 68 (see Table 2.3 in the Appendix). However, given that capital offences accounted for 24.56% of the total number of 114 criminal offences in the 1979 Criminal Law, the rate of capital offences of all criminal offences under the 1997 Criminal Law actually fell to a rate of 16.11% (68 out of 422). From 1997 to 2011, the Chinese legislature has further reduced the number of capital offences to 67 via legal amendments. This trend of decline contrasts with the overall increase in the number of criminal offences from 422 to 435. In other words, the percentage of capital offences of all penal offences started to drop even before the legislative abolition of 13 capital offences in 2011.

As is shown in a brief comparison between the main categories of capital offences in the 1979 Criminal Law and the 1997 Criminal Law (see Figure 5), the targeted

³⁸ There are two forms of capital punishment under 1997 Criminal Law - immediate execution and the death sentence with a two-year suspension of execution. The latter allows for the commutation of the sentence if the condemned prisoners do not deliberately commit crimes during the two years suspension period. The terms of 'death sentence' in the context of Chinese criminal law in this thesis refer to the former type of death penalty - immediate execution – unless it is specifically stated as 'suspended death'.

criminal behaviours of the state penal power shifted from political crimes in the 1979 Criminal Law to crimes disrupting economy and social order in the 1997 Criminal Law. Specifically, in the 1979 Criminal Law – a crime statute issued soon after the closure of Maoist era – 15 capital offences out of 28 were counterrevolutionary offences (Figure 3). In contrast, crimes which disrupt the order of the socialist market economy and crimes which endanger the security of social order accounted for 42% of all capital offences in the 1997 Criminal Law – a penal code drafted in a time when China’s transition towards market capitalism reached full force (Figure 4). The shifting focus of penal power indicated changing needs of social and political governance in different historical eras and the continued instrumental value of capital punishment in serving these needs.

Figure 3: The Distribution of Capital Offences in Each Chapter of 1979 Criminal Law

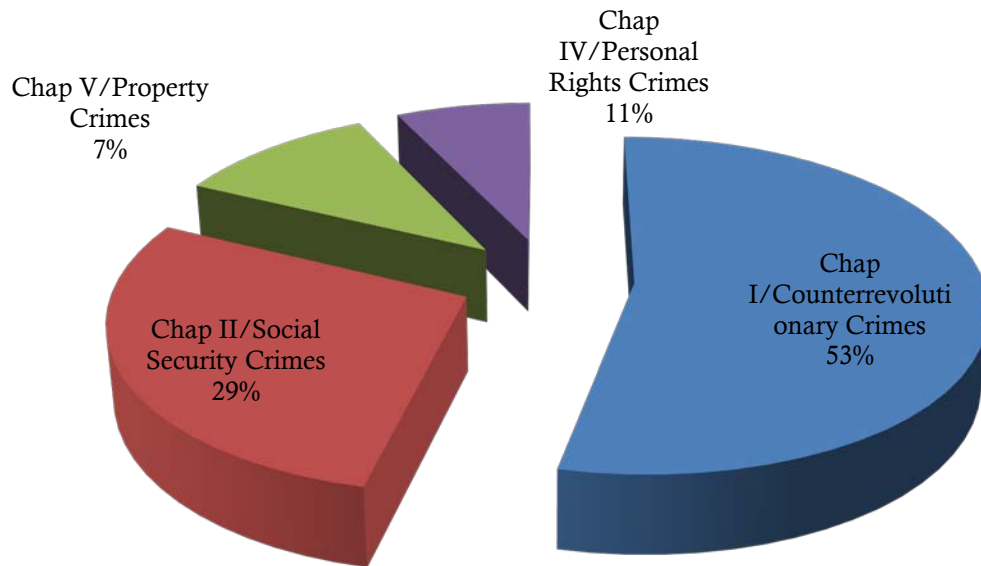
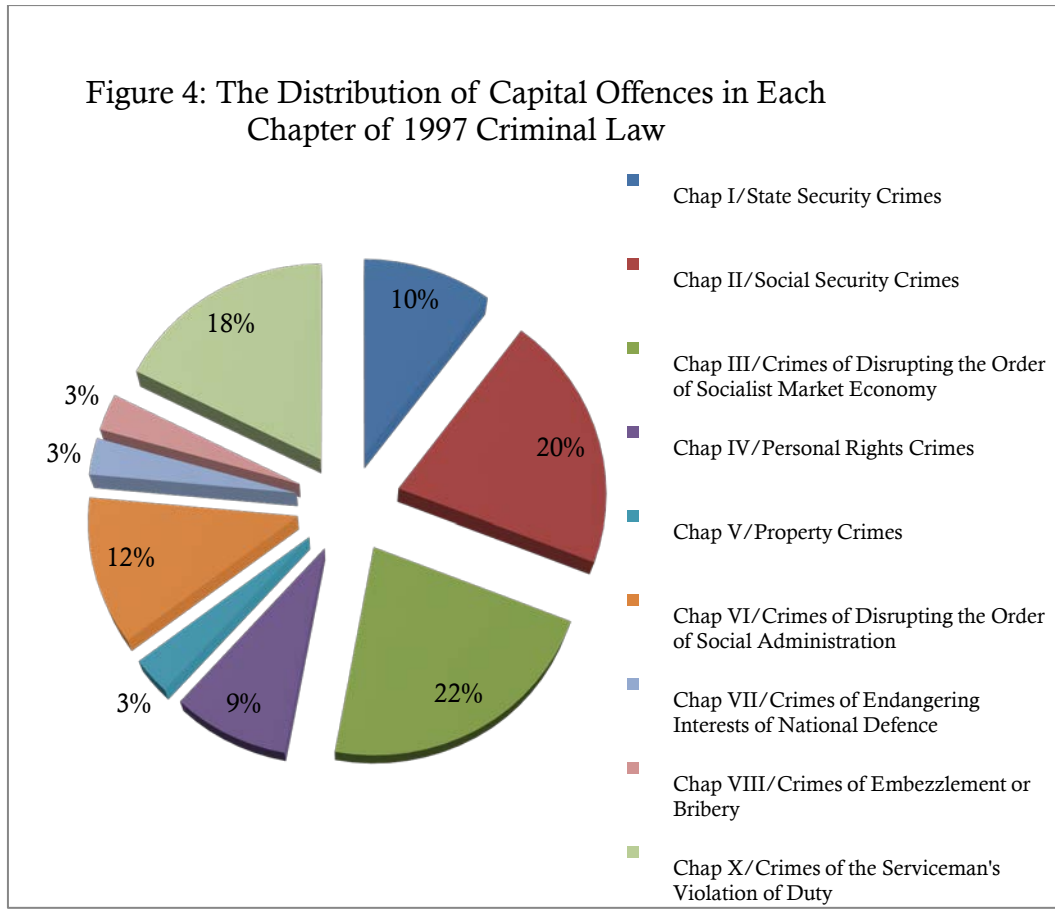
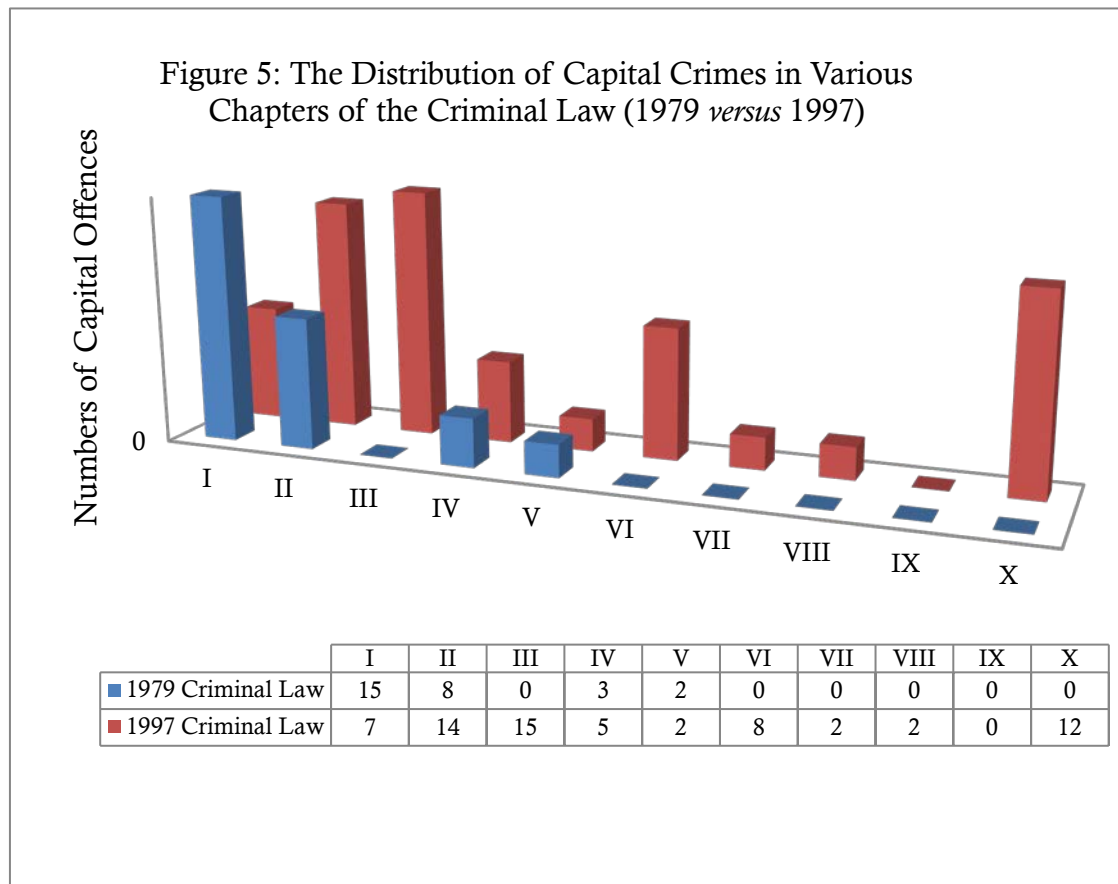


Figure 4: The Distribution of Capital Offences in Each Chapter of 1997 Criminal Law





In comparison to the 1979 Criminal Law, the 1997 Criminal Law added several procedural safeguards as regards the application of the death penalty. First, it was provided in the 1997 Criminal Law that the death penalty was only applicable to those criminals who are guilty of the ‘most heinous crimes’ (article 48). This provision was much more limited in scope than the wording of the 1979 Criminal Law that the death penalty was reserved for ‘criminals of the worst kind’ (article 43) as the latter suggests the criterion for application of capital punishment depends on the *mens rea* (subjective blameworthiness) of the offender, rather than *actus reus* (objective culpability) of his criminal behaviour. As a result, the language adopted by the 1979 Criminal Law can be broadly interpreted to include a wide range of criminal behaviours. Secondly, the 1997 Criminal Law precluded minors who are

between the age of 16 and 18 from the scope of suspended death penalty, even if their criminal conduct was extremely serious.³⁹ This may reflect a renewed interest in, and the willingness of the Chinese legislative authorities to take note of evolving international human rights standards which have a particular emphasis on the protection of minors from the death penalty.

Third, the thresholds of commuting two-year suspended death sentences to life imprisonment or lesser punishments were lowered in the 1997 Criminal Law. The 1979 Criminal Law stipulated that those who were sentenced to suspended death must show true repentance during the period of suspension to have their sentences commuted to life imprisonment, and must show true repentance and perform meritorious service to be commuted to fixed-term imprisonment of not less than 15 years and not more than 20 years (article 46). The 1997 Criminal Law provided instead that those who do not commit intentional crimes during the period of two years are eligible for commutation. In other words, only those who committed intentional crimes during the suspension period could be subject to immediate execution. Evidently, the latter grants capital prisoners a better chance of life.

Finally, the thresholds for applying capital punishment have been raised for a variety of offences such as deliberate injury, corruption, theft, rape, robbery, and taking bribes. For instance, it was not unusual for the legal authorities to sentence to death those who stole cars, motorcycles or other goods and property during Strike Hard Campaigns in the 1980s and the 1990s. The 1997 Criminal Law, although retaining

³⁹ Article 49 of the 1997 Criminal Law, cf. article 44 of the 1979 Criminal Law.

the death sentence for such offences, has further restricted the application of the death penalty with regards to theft – only theft of precious relics or financial institutions are subject to the death penalty (Chen, 2006: 67). The legislative restriction of the application of the death penalty to theft in rare circumstances in fact was a compromise between conservative forces insisting on punishing theft with the ultimate sanctions and reform-minded experts and scholars promoting removal of theft from the scope of capital punishment (Luo, 2010). Chen Xingliang, a renowned Chinese criminal law professor, commented in 2010 that although quite a few people were concerned that the elimination of theft of common property and goods from the scope of capital offences in the 1997 Criminal Law would lead to a sudden increase in theft offences, 13 years of penal history had proved the contrary (Chen, 2010a).

The Administration of Capital Punishment in Practice during Strike Hard Campaigns

The greater protection afforded to vulnerable groups and insistence on procedural due process in the 1997 Criminal Law, at a time when Strike Hard Campaigns were still dominating the Chinese penal regime, shows the positive influences of scholars and reform-minded legislators in promoting China's march towards the rule of law and human rights. Indeed, one of the interviewees called the debates and discussions on restricting the scope of capital offences during the drafting stage of the 1997 Criminal Law as 'sowing the seeds for capital punishment reforms in the 21st century'. Parallel to this trend of penal moderation and regularization in the opening-and-reform era, there has also been a periodical toughening up of penal policies since the early 1980s. Campaign-style crackdowns on crimes led to an increase in the use of

the death penalty, increasing reliance on mass-line campaign and a relaxation of the judicial procedure in capital cases (Tanner, 1999: 72-73; Chen, 2005a: 521; Griffin, 1976).

On the one hand, in a broader context, there has been a sustained and gradual move towards penal certainty, bureaucratization, formality, modernization and institutionalization as compared to the lawless approach to penal justice in Maoist era. On the other hand, there have been periodic outbursts of populist justice and excessive punitivity as reflected in the Strike Hard Campaigns. The administration of capital punishment in the Deng-Jiang era has been shaped by the juxtaposition of these conflicting tendencies within the penal regime.

As such, the past three decades (1982-2012) of contemporary Chinese penal history saw at least four rounds of nationwide Strike Hard Campaigns⁴⁰ and almost continuous regional campaigns and 'specified struggles' (*zhuan xiang dou zheng*)⁴¹. There were signs of routinization (Liu et al., 2001: 100; Bakken, 2005: 178-179; Trevaskes, 2010: 340) of campaign-style crackdowns on crimes in the daily administration of penal justice and capital punishment (Tanner, 1999: 72; Griffin, 1976) in the last two decades of the 20th century. For instance, in his annual Work Report to the NPC in 1998, the then President of the SPC, Ren Jianxin explicitly

⁴⁰ The four national-scale Strike Hard campaigns include the Campaign from August 1983 to December 1986, the Campaign from April 1996-February 1997, the Campaign from April 2001 to December 2002, and the most recent Campaign in 2010.

⁴¹ These strike hard campaigns were localized - launched in one province, city or county - or had a special theme (to crackdown on one or several particular criminal offences, such as prostitution, robbery or drug offences). For instance, Beijing Public Security Bureau launched a strike hard campaign in May 1990 to 'ensure the Asian Games can be held uneventful'. See (Mao, 1990).

stated that 'carrying out deeper and sustained hard strikes campaigns...is an important, long-term task of the people's courts' (Ren, 1999: 19-24).

Hard-Strike crackdowns were widely known as a coping strategy initially aimed at controlling the escalating crime rates in the opening-and-reform era. From extremely low crime rates in Mao's China - when 'doors were unbolted at night and no-one pocketed anything found on the road' (Bakken, 1993: 29) - to a time when female workers dared not to walk in the night alone in the early 1980s (Editor, 1988), the upsurge in levels and categories of criminal activities⁴² was caused by a wide variety of social changes ranging from growing incompetency of law enforcement to police an increasingly heterogeneous society, to massive increase in rural-urban migration (Christiansen and Rai, 1996: 179; Leng and Chiu, 1985: 132; Bakken, 1993).

In fact, rampant crime problems were perceived as threats to the party-state's ideology, legitimacy and social order (Leng and Chiu, 1985: 132; Bakken, 1993). The CCP's capacity to sustain stability and social order has been considered the touchstone of its political legitimacy (Shue, 2004) in the post-Mao era. Rising crimes may lead the ruling elites to feel at risk of losing the faith of the masses in the efficacy of state machinery to control crime and protect their interests. Police recorded statistics reported an increase of a total incidence of 340 per cent and a ten-fold increase in serious crime rates from 1979 to 1990.⁴³ To the Chinese politico-legal

⁴² The incidence of crime in China was relatively low compared to other countries in the world at that time. However, it was considered unacceptably high according to Chinese standards and was growing at a speed which was unprecedentedly fast. (Dutton, 1992: 327; Tanner, 1999: 166)

⁴³ In 1978, the crime rates in China were 55.91 (per 100,000 population). It increased to 163.19 per 100,000 in 1998. The robbery rate in 1998 (10.8 per 100,000) was about five times higher than that in

authorities, statistics showing a pattern of sudden rise in a range of criminal conducts provided justifications for the necessity and urgency to rely on harsh punishment to bring order out of chaos. Alternatively, even a temporary drop in crime rates provided the best evidence for the success of the effectuation of harsh penal policies.

As such, Chinese newspapers frequently hailed the victory of Strike Hard Campaigns in curbing soaring crimes. For instance, following the 1983-1987 Strike Hard Campaign, the *People's Daily* reported in March 1987 that the crime rates in Beijing dropped by 37.7% since August 1983 (He and Mao, 1987). It was also reported that crime rates in Guangxi decreased by 35% during January-March 1986, compared to the same period in 1983 (Zheng, 1987); and the crime rates in Sichuan dropped by 32.3% in 1986, in comparison with the average crime rates in the same region from 1980 to 1982 (Luo, 1987).

However, what is the real causal relationship between the Strike Hard Campaigns and the increase in crime rates in China? Would crime rates grow at a much faster speed without the Strike Hard Campaigns? Or alternatively, is it possible that the routinized, prolonged toughening up of penal policies contributed to the continuous increase in incidence of crime throughout the 1980s and the 1990s? It has been widely expressed by penal policy makers in China (including quite a few of my elite interviewees) that although the Strike Hard Campaigns failed to reverse the increase in crime rates in the long term, the situation would be even worse without them. This assumption has rarely been challenged by criminologists, criminal law scholars or

1978 (2.8 per 100,000). New offences, especially offences related to economic activities were skyrocketing. See (Lu and Zhang, 2005: 368; Liu and Messner, 2001a).

legal professionals, as little quantitative research has been conducted on this politically sensitive topic within academia.

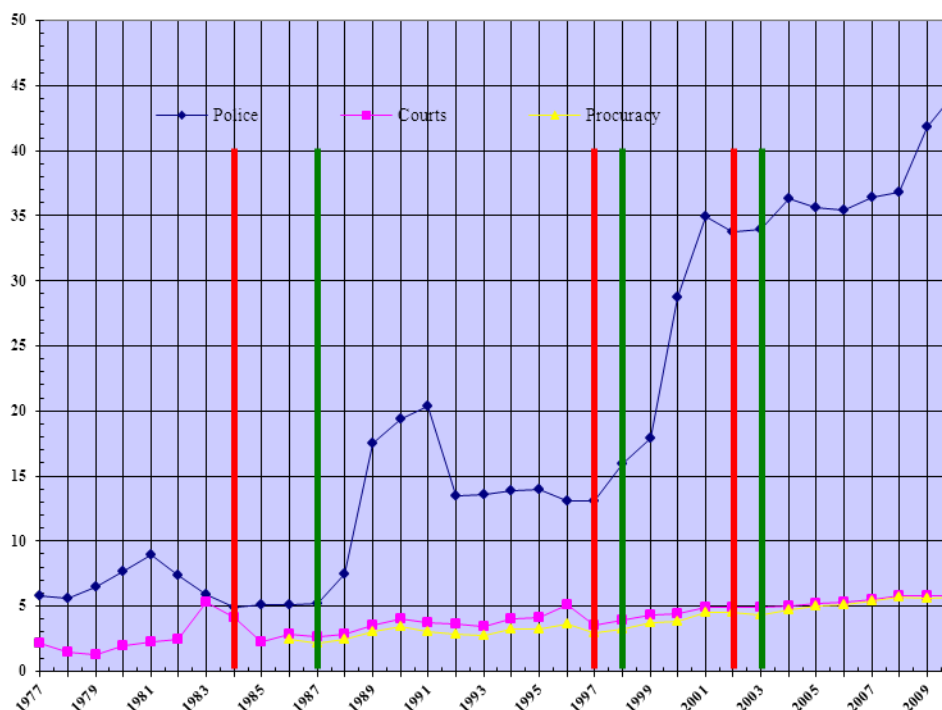
Nevertheless, my primary analysis of official crime statistics⁴⁴ (1977- 2010) below shows that an almost intuitive resort to harsh penalties – due to fear about soaring crimes and simmering public discontent – was based on insufficient knowledge of criminological evidence about the efficacy and effectiveness of Strike Hard Campaigns. Three sets of figures that are relevant to the calculation of crime rates in China are examined here; namely, the number of criminal cases recorded by the police (public security organs)⁴⁵, the number of criminal cases the procuratorates decided to bring charges against, and how many criminal cases the courts initiated first-instance trials for. Crime rates per 10,000 of the population were calculated by dividing the number of recorded crimes from each agency by the total population of China each year (see Table 3.3 in the Appendix and Figure 6).

⁴⁴ Although scholars have frequently questioned the reliability of official criminal justice statistics in China, including crime rates, it is believed that the official data roughly reflect the truth. Existing studies reported problems of under-reporting and under-recording by the police (Liu, 2005; Yu and Zhang, 1999a), limited availability and restricted access, and the lack of standardized indicators (He and Marshall, 1997). Despite these limitations, official data may allow us to comment tentatively on general trends and changes to crime rates (Liu and Messner, 2001a; Yu and Zhang, 1999b; Liu, 2005) and become a useful index of change in the state use of formal social control mechanisms (He and Marshall, 1997).

⁴⁵ This figure merely indicate the number of criminal cases the police dealt with, which is different from the number of criminal cases transferred from the police to the procuracy for instituting criminal charges.

Figure 6. China's Crime Rates (1977-2010)

(per 10,000 population)



Notes: The three sets of red-green lines represent the starting year and ending year of three national-level strike hard campaigns (1983-1986; 1996-1997; 2001-2003)

Sources: See Table 3.3 in the Appendix

First, even a quick glimpse at the three sets of ratios reveals substantial variance between the numbers provided by the police on the one hand and the figures from procuratorates as well as courts on the other. The growing disparity since the late 1980s may indicate that only a small fraction of the criminal cases the police dealt with each year were transferred to the procuracy for the latter to make a decision on whether to bring criminal charges. Since the vast majority of the first trial cases were prepared by procuratorates, we may conclude that a significant portion of the criminal cases recorded by the police did not even enter the formal proceedings of court trials. An argument based on this observation could be that the deterrent effect

of excessive punitiveness has been marginal, simply because no penal sanction was officially meted out for a considerable number of police suspects. In other words, a substantial number of suspects arrested by the police, detained in police custodies, and even subject to forced labour during the Strike Hard Campaigns, were not convicted before the court. Increased levels of punitive punishment during the Strike Hard Campaigns, therefore, was not meaningful unless detention and forced labour during the pre-trial stages themselves are considered legitimate penal sanctions.

Alternatively, one can argue that resorting to an increasingly harsh penal policy over the past three decades was not sufficiently justified with regards to the increase in crime rates. According to the incidence of crimes calculated with figures provided by the courts and procuratorates, the incidents of crimes in China (1977 - 2010) increased only slightly from 2.2 to 5.8 per 10,000 of the population. In particular, incidents of crimes - calculated with data provided by the police - dropped in 1982⁴⁶ before the start of the first round of nationwide Strike Hard Campaign (1983).

Third, the deterrent effect of harsh penal punishment, including capital punishment, has not proven durable. The fact that all three sets of crime rates dropped quickly after the launch of strike hard campaigns but went up immediately after the end of such campaigns substantiates an assumption about the limited effect of using harsh punishments to deter crimes in China. Further, in a three-year strike hard campaign from 1983 to 1987, the crime rates during the second and the third year of the

⁴⁶ In the first six months of 1982, the total number of criminal cases in eighteen major cities with a population above one million was 25.1% lower than the same period of 1981 and 10.4% lower than the latter half of 1981. See (Leng and Chiu, 1985: 135)

campaign apparently froze after an initial drop in the first year or so. This indicates that once the strategy of a harsh clamp down on offenders becomes a prolonged, routine policy, its alleged deterrent effect could decrease with the passage of time.

During the Strike Hard Campaigns in 1983, which the editors of *the Forty Years of Rule by the Chinese Communist Party* labelled as the largest crackdown on crimes since the Campaign to Suppress Counter-revolutionaries in the early 1950s (Tanner, 1999: 85), the legally-provided ten-day period offered for prisoners to file appeals was cut short to three days in order to speed up the process of adjudication (Lu and Zhang, 2005: 373). Extreme examples of swift and arbitrary justice can be found in 1981 in Nanjing and in 1983 in Luoding, where respectively within eight days a murder case and a rape case were investigated, the defendants arrested and taken into custody, prosecuted, tried, had their appeals filed and rejected, and executed (Tanner, 1999: 76; Trevaskes, 2007a: 129). As Tanner has observed, during the Strike Hard Campaigns, the role of criminal defence lawyers in trials was restricted to an extent that they could only be retained seven days before trials; if they had significant disagreements with the key facts and evidence or the application of law in capital cases, they had to raise these questions with a political-legal affairs commission of local CCP committees instead of legal authorities. The unprecedentedly swift justice and punitive sentences promoted no protest from the defendants and their legal representatives as they ‘realized that appeal would be useless, if not dangerous.’ (Tanner, 1999: 96-97)

Party-made strike hard policy which has dominated the administration of criminal justice in China for two decades, arguably, was one of the leading causes of China’s

high volume of executions in post-Mao era (Trevaskes, 2008: 395). Strike Hard crackdowns, in particular the first round in the early-mid 1980s, were considered to be one of the bloodiest chapters in China's penal history. Without access to the records showing the accurate annual number of executions – which are believed to be kept by the SPC – tentative estimates made by foreign scholars and human rights NGOs based on available incomplete reports and anecdotal evidence indicate that the number of executions range from 1,000 to 7,500 per year during this era (Scobell, 1991: 205-207; Amnesty International, 1989: 123; Hood, 1996: 73). Interestingly, estimates made by Chinese informants by extrapolating incomplete provincial statistics suggest an even higher annual average of eight thousand to ten thousand during the late 1980s and the early 1990s (Tanner, 1999: 140-141).

This increase in capital sentencing was accompanied by a relaxation of review procedures in capital cases. Both the 1979 Criminal Law and the 1979 Criminal Procedure Law prescribed that the SPC was the sole legal authority responsible for the review of capital cases. However, in February 1980, only one month after both 1979 Criminal Law and 1979 Criminal Procedure Law came into effect, the Thirteenth Meeting of the Standing Committee of the Fifth National People's Congress (hereinafter the SCNPC) authorized the SPC to temporarily delegate its review power to provincial-level courts in serious cases involving murder, rape, robbery and arson. This temporary devolution of review power was further extended to 1983 by the *Decision on the Review of Capital Cases by the Standing Committee of National People's Congress* (1981). As a result, from 1981 to 1983, apart from counterrevolutionary offences and offences relating to corruption, all other cases

were *de facto* reviewed by provincial-level courts. *The Decision to Amend the Organization Law of the People's Courts by the Standing Committee of National People's Congress* issued in 1983 further confirmed that the review power can be delegated *whenever it is necessary*. In other words, the devolution of review power became a long-term penal policy.

In 1991 and 1992, in order to combat drug crimes, the SPC authorized five provincial-level courts to review capital cases involving drug offences so that the penal process from arrest to final review could be shortened. As a result, these legal interpretations resulted in a decentralization of the final checking power in capital cases, in contrast to the provisions in the 1979 Criminal Law and the 1979 Criminal Law. Under this arrangement, concerns for accuracy and fairness in capital cases were compromised because the final review procedure was often got combined with the second-instance (appellant) hearings (Tanner, 1999: 140). After all, once the power is delegated to provincial-level judiciaries, it would not be meaningful to set up a separate, final procedure for appellant judges to supervise their *own* decisions. This *de facto* abolition of the final review procedure continued despite the reiteration by the 1997 Criminal Law that capital cases should only be reviewed by the SPC.

While Strike Hard Campaigns became a routine crime deterrence and social control strategy, they gradually became more geographically focused and crime-type specific. The past three decades saw shortened length and reduced severity of these Campaigns. These changes suggest that an increasing number of penal policy-makers and those who are able to exert influence on them may have started to question the

legitimacy, efficacy and effectiveness of China's campaign-style crime-fighting strategy. The smug optimism shared by politicians and legal professionals in earlier periods gradually gave way to growing ambivalence and even outright criticism of the policies as time went by. As an interviewee from the LACSCNPC observed in 2010, 'almost thirty years following the launch of the first-ever Strike Hard Campaign, legal professionals now have a better understanding of the causes of crimes and the effectiveness of penal sanctions. They have different expectations of punitive measures (then people in the 1980s). The younger generation of judges, prosecutors and legislators hold different views regarding penal policies from the opinions of the older generation of legal professionals, those who were in charge of China's Strike Hard Campaigns'. The attitudinal shift is one of the important contributing factors in the declining popularity of Strike Hard Campaigns in today's China.

To date, crackdowns on crimes are yet to be officially rejected by the legal and political authorities, or openly challenged within the academic community. Private-owned, commercialized local media has begun to conduct in-depth investigation of the impact of Strike Hard Campaigns and to disseminate these findings. For instance, in 2011, an article in the *Chongqing Daily* on the 'fighting dark and evil forces' – a most recent regional Strike Hard Campaign well-known for its harshness and abuse of due process – reported that instead of declining, the number of crime cases dealt with by the police in Chongqing in 2011 reached historical highs (Zhang and Wen, 2011). Meanwhile, public debates and academic research on Strike Hard Campaigns, still politically sensitive, are no longer strictly forbidden.

The politicized Strike-Hard approach to penal justice left a deep mark on China's criminal justice system. The administration of capital punishment during this era was riddled with widespread erroneous adjudication, arbitrary abuse of penal power, and gross violation of the due process rights of defendants. Occasionally, the suffering of defendants in capital cases involving miscarriages of justice attracted the attention of the media, resulting in retrials or re-investigations by the judiciaries, and finally leading to the exoneration of defendants. Media exposure of these high profile capital cases, such as Nie Shubin, She Xianglin, Du Peiwu, Qiu Xinghua, and Zhao Zuohai has brought public attention to and undermined public confidence in the flawed capital punishment regime. With great sympathy for the plight of the victims of wrongful convictions and executions, reform-minded scholars and legal professionals called for the SPC to recall its power to review the death penalty. In this context, the top-down, elite-led reforms of China's capital punishment regime started to gain momentum in the mid-2000s. In particular, the recall of review power in capital cases by the SPC in 2007 was believed to be 'an important procedural step to prevent wrongful convictions' (Xinhua, 2006).

Conclusion

The reliance on capital punishment in contemporary China has, to a large extent, been politically motivated. As Johnson and Zimring (2009: 269) have argued, the Chinese capital punishment regime is 'political at its core'. By tracing China's use of capital punishment as an instrument of governance over three phases – the pre-PRC era (1920s-1949), the Maoist era (1949-late 1970s), and the post-Mao Strike Hard era (late 1970s – mid 2000s), this chapter concludes that China's capital punishment

regime has served as a political instrument to reconfirm the political legitimacy of the Party and to strengthen the political power of the state. Its specific functions, however, have shifted over time: capital punishment acted as an instrument to win the support of the masses and served as a tool of consolidating political power in Maoist era, and a device to fight crimes in post-Mao Strike Hard era.

This chapter further found that capital punishment policies and practices in contemporary China are shaped by contradicting forces within the legal community and the political leadership since the early days. In the Maoist eras, there were constant conflicts and struggles between forces supporting regularization of penal power as well as restraining the use of capital punishment, and forces endorsing the heavy use of capital punishment as well as a tendency to disregard due process safeguards as prescribed in the letter of penal codes. In the Deng-Jiang's Strike Hard era, politico-penal authorities endorsed campaign-style crackdowns on offenders, which were characterized by swift justice and summary trials and excessive use of capital punishment. On the other hand, the legal reform launched by Deng Xiaoping began to yield legal theories and norms demanding improvement in procedural fairness and enhancement of due process safeguards for penal offenders and suspects. The tension in this era was arguably a new variation of the populist mass-line *versus* elitist bureaucratism under the rule of Mao Zedong.

In the context of capital punishment administration, this tension takes the form of the contradiction between lax procedures and excessive use of capital punishment during Strike Hard Campaigns and the insistence of legislators on vesting the review power on China's top judiciary and providing due process protections for capital

offenders. Unfortunately, at least during the various rounds of nationwide Strike Hard Campaigns, it was the former approach that prevailed. As a result, China's use of capital punishment has been long fluctuating between excessiveness and restraint, between lawless and regularization. It seems that these vastly different penal ideologies between the law and practice in the field of criminal justice reflected division within the circles of penal decision makers and probably even within the political leadership (Davis, 1987: 329) regarding the specific penal strategies, techniques and approaches to govern Chinese society in the open-and-reform era. The landscape of capital punishment policies during a specific historical stage thus, to a large extent, depends on the outcome of political struggles between different fractions and the particular social conditions underpinning the shift in political power.

Chapter Three. The Reform of the Chinese Capital Punishment

Regime

Introduction

Since the late 1970s, unlike other developing countries such as India and former Eastern European countries, China has set to pursue an unprecedented path of socio-economic development which can be characterised as economically liberal and politically conservative. On the economic aspect, this strategy has led to a success in achieving the desired speed of economic growth. Both admirers and critics of China's economic marketization agree that China's economic performance over the past thirty five years has been impressive, in particular compared to the sudden institutional demise in the former Soviet bloc. On the other hand, this process of rapid economic growth has generated profound social consequences including rising corruption, enlarging economic inequality, and greater political and social instability (Bian, 2002; Dollar, 2007; Lin, 2002). In fact, economic marketization has both enhanced the CCP's dominating rule by earning support from those who benefited from the economic growth and also posed threats to the credibility and ideology of the CCP from those whose interests were damaged in such processes (MacFarquhar, 1987).

Simultaneously with the economic reform, the Communist leadership has also launched reforms in non-economic arenas, be it administrative, legal, social or

political. Most of these non-economic reforms, however, were discredited as half-hearted efforts of an ailing regime to maintain its shaky stability and legitimacy (Heberer, 2006). Among them, Chinese legal reform has earned considerable appreciation in the West, but there has also been overwhelming cynicism surrounding each and every step of these reforms. On the one hand, the country's impressive market modernization program highlighted the importance of constructing a legal system commensurate with China's new economic ambitions (Cohen, 2005; Lubman, 1999: 2). On the other, the need to maintain tight political control by the party-state necessitates a legal regime tailored to cope with rising social and political problems with the economic-social transition. The course of development of legal reforms therefore was shaped by these two underpinning, contradicting, forces.

China's reform of its capital punishment regime, which is subject to these conflicting forces, has garnered worldwide attention as its use of capital punishment has long been a target for vehement and continuous criticisms by Western media and human rights activists. Against the backdrop of a 'new global dynamic' calling for abolishing and restricting the use of capital punishment worldwide, China's excessive death penalty practice at the end of the 20th century and the beginning of the 21st century appears to be appalling in the eyes of Westerners. Western sentiments against China's capital punishment record have been further fuelled by the extreme secrecy surrounding the administration of capital punishment in China (Amnesty International, 2012).

Despite the continuous and vociferous Western concerns about China's use of capital punishment, there has been little close examination of the considerable gaps between the international human rights standards (Schabas, 1997) and the flawed administration of capital punishment before and even after the recent reforms. The main aim of this chapter is to outline the initiatives of capital punishment reforms and the subsequent changes to the death penalty norms and practices. It is composed of two segments. The first part of this chapter shows how China's capital punishment practice and norms have changed under the reforms and what has been left out of the reform plan by comparing the Chinese regime with the international human rights standards in a thematic fashion. The second section will focus on examining the practical impact of the reforms, explaining whether the reform is important and to what extent is it significant.

Section One. Comparing the Chinese practice with international human rights standards: a Thematic Narrative

Since the mid-2000s, China's political-legal authorities, led by its top judiciary, embarked on a series of reform initiatives to improve its capital punishment regime: the review power over capital cases was returned to the SPC from the HPCs; appellant trials were held in open courts instead of in secrecy; a legislative leap to remove 13 capital offences from the Criminal Law was taken in 2010; the elderly (above the age of 75) were no longer punishable by death in principle; lethal injections have gradually replaced shooting as the main method of execution nationwide. It seems the Chinese political-legal authorities and Chinese scholars

gradually recognized and accepted the protection of human rights and the defendants' rights to due process safeguards through its dialogue with foreign governments and human rights organizations. As the findings presented below reveal, China has made laudable adjustments in the past decade, though is yet to fully respect existing international standards on the use of the death penalty (Hood, 2009; Qiu, 2002).

This said, after the resignation of Chief Justice Xiao Yang in 2008, it seems that under the new leadership of the SPC⁴⁷, China's reform of its capital punishment regime has become stagnant. Substantive reforms – first planned out in the Outlines for the Second Five-year Reform of the People's Courts (2004-2008) – required all capital case appeals to be held in open courts and lay witnesses and expert witnesses to be present in the first and the second instance trials, as well as empowered the SPC to recall its review power on all capital cases (The Supreme People's Court, 2006). By way of comparison, the Outlines for the Third Five-year Reform of the People's Courts (2009-2013) merely reiterated that the death penalty review system needs to be further improved, without proposing any substantial reform measures to do so (The Supreme People's Court, 2009).

Limiting the Use of Capital Punishment to 'the Most Serious Crimes'

⁴⁷ The former president of the SPC, Xiao Yang, resigned in March 2008. His successor, Wang Shengjun, is not a legal professional but a police and party administrator. He has introduced a doctrine known as the Three Supremes, which are, in order of importance, first the party, then the people, and last, the law. Some commentators are worried that the rule of law in China has suffered a setback following changes to the leadership of the Supreme People's Court. In particular, the first public signal of Mr Wang's leadership was his announcement April 2009 that, in handling death cases, the courts had to consider not only the law and social conditions but also 'the feelings of the masses'. See Jerome A Cohen's remarks in (Lim, 2009)

With the ultimate goal of abolishing the death penalty, international human rights activists and organizations have endeavoured to restrict the use of capital punishment to an increasingly shrinking group of offences. However, from the first appearance of this notion in the International Covenant on Civil and Political Rights (hereinafter the ICCPR) in 1966, the term of the 'most serious crimes' has been left undefined due to the difficulty for member states to reach a consensus on its meaning (Schabas, 2002: 160). This ambiguous and flexible wording enabled individual countries to enumerate offences which should be excluded from the scope of death-eligible offences based on their own preferences and understandings. In order to prevent overly liberal interpretation of the term, the UN ECOSOC 'Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty' in 1984 defined its meaning as 'intentional crimes with lethal or other extremely grave consequences' (United Nations Economic and Social Council, 1984). But again, it is open to interpretation by different countries what is meant by 'grave consequences' (Hood, 2006: 3).

Although the development of international human rights jurisprudence encourages progressive narrowing-down of the interpretation of this word, in China, this word has been used to refer to a broad range of criminal offences beyond intentional killing which resulted in the loss of life. Similar definitions to 'the most serious offences' was used in the Chinese Criminal Law 1979 and Criminal Law 1997. Article 43 of the 1979 Criminal Law which provided 29 capital offences, stipulated that the death penalty can only be imposed on criminal offenders who 'committed extremely serious crimes and who are extremely evil' (*zui da e ji*). Article 48 of the 1997 Criminal Law, which prescribed 68 capital offences ranging from theft to smuggling

pandas across national borders, provides that capital punishment is eligible for those who 'commit extremely serious crimes' (*zui xing ji qi yan zhong*). The ambit of 'the most serious crimes' in Chinese criminal law has been undefined.

The terms in Chinese criminal law are usually so broadly interpreted that the phrase of 'the most serious crimes' sometimes is synonymous with 'capital offences'.

Ironically, with the explicit emphasis that capital punishment should only be imposed for the most egregious crimes on the letter of the law, the numbers of capital offences during Strike Hard campaigns in the 1980s and the 1990s expanded to new historical heights. The only attempt to articulate this term in the form of judicial interpretation was the 'Brief of the Forum on Criminal Trials of People's Courts Nationwide to Maintain Stability in Rural Areas', issued by the SPC in 1999. This Brief emphasized that, unlike reckless homicide or negligence homicide, only intentional injuries with extremely cruel methods, aggravated circumstances and loss of life can be sentenced to death. It also specified that the death sentence should not be imposed in cases of victim provocation where the victim was deemed to be at fault, and suggested that the death penalty does not apply to homicide among family members or as a result of a quarrel among neighbours (The Supreme People's Court, 1999). This may be deemed as the very first endeavour of the top judiciary to limit the scope of capital eligible murders at the end of the 20th century.

Most positive changes did not occur until very recently. In February 2010, Article 29 of the 'Comments on Implementing the Penal Policy of Justice Tempered with Mercy', issued by the SPC, provided that 'we should ...ensure that the death penalty only be imposed on those who have committed extremely serious crimes' ... 'those

who have committed serious crimes should be spared from immediate execution if the law allows' (Xinhua News Net, 2010). The wording of the Comments clearly indicates to judges that they could use their discretionary power to exclude those who were formerly eligible for death from immediate execution as long as their sentencing does not contradict the letter of the law. This new guidance inspired by the penal policy of 'tempering justice with mercy' (*kuan yan xiang ji*) stands in contrast with the old policy of 'punish hard, punish severely' (*cong zhong cong kuai*), which dictated that judges to use their discretionary power to sentence defendants to immediate execution whenever necessary, as long as the death sentences did not contradict the letter of law. No doubt, this shift in the spirit of penal policy suggests important changes towards narrowing down the scope of death-qualified criminal offences.

The most recent legislative effort to constrict the scope of death-eligible offences is the Eighth Amendment to the Criminal Law (The Standing Committee of the National People's Congress, 2011), which removed 13 non-violent, economic crimes⁴⁸ from the list of capital offences on 25 February 2011 (Stack, 2010; Hogg, 2011). This legislative effort signifies that China has pursued an approach of progressive restriction of the scope of capital offences, rather than a comprehensive plan to exclude all types of capital crimes currently punishable by death. After this

⁴⁸ This list of 13 offences includes smuggling Cultural Relics (art. 151, para. 4), smuggling of precious metals (art.151, para. 4), Smuggling Precious and Rare Species of Wildlife and the Products Thereof (art.151, para. 4), Smuggling Ordinary Goods or Articles (art. 153), Banking Notes Fraud (art. 194, para. 1), Financial Instrument Fraud (art. 194, para. 2), Letter of Credit Fraud (art. 195), Grave robbery and Falsely Issuing Value-added Tax Invoices or Any Other Invoices to Defraud Export Tax Refunds or Offset Taxes (art. 205), Counterfeiting Value-added Tax Invoices or Sells Counterfeited Value-added Tax Invoices (art. 206), Imparting Methods for Committing Crimes (art. 295), Excavating and Robbing Ancient Cultural Remains or Ancient Tombs (art. 328, para. 1), Excavating and Robbing Ancient Fossils of Ancient Human Being or Ancient Vertebrates (art. 328, para. 2).

amendment in law, the death penalty remains on the books as a punishment for as many as 55 crimes - ranging from accepting bribes to manufacturing fake medicine - of which 57% (31 offences) remain non-violent offences. According to my elite interviews with a few SPC judges, the top four categories of capital offences which result in the largest number of executions in China are murder, robbery, intentional infliction of physical harm and drug crimes. Apart from these most frequently used capital offences, death sentences meted out for the other crimes are relatively rare. It seems that even after the recent reforms, there remains a huge gap between the Chinese notion of 'the most serious crimes' and the interpretation of this notion by the UN ECOSOC Safeguards which guaranteed the protection of rights of those facing the death penalty.

So why does the Chinese legislature still keep most of these capital offences in law despite the fact that in practice they rarely result in capital convictions and executions in recent years? My interviews with legal professionals in China suggest that the legislature takes an extremely cautious route to reduce the scope of capital offences mainly due to concerns that radical plans may result in disapproval of public opinion. One of my interviewees commented: 'public opinion cannot be ignored in current China. The state of public opinion has the utmost impact on the legislative process. Let's be honest – the French President may sign the abolition act into law, in contrary to the mainstream public opinion. That's never gonna happen in China.' Indeed, proposals to abolish the death penalty as a form of punishment for offences such as taking bribes and corruption during the drafting process of the Eighth Amendment to Criminal Law in 2011 met significant resistance from the general public. Although these crimes were not officially written into the proposed abolition

list of the first draft of the Eighth Amendment, leaked minutes of a closed session of the LACSCNPC revealed that some members of the Standing Committee proposed that such offences would be exempted from capital punishment.

Heated public criticisms were sparked across the country, with people worrying that abolishing the death penalty for those offences would be exploited by corrupted officials as a way to escape their criminal responsibility. Strong public resistance forced a government official, Chen Sixi, member of the SCNPC and vice chairman of the NPC's Committee for Internal and Judicial Affairs, to openly announce that the Chinese national legislature did not intend to eliminate capital punishment for corruption and taking bribes and those who have been convicted of such crimes 'should be subject to harsh penalties' (Mu, 2010). As a result, a Chinese scholar estimated that in the face of huge resistance towards abolition of capital punishment on crimes relating to taking bribes and corruption, abolition of these offences would not be achieved 'at least for the next 30 years' (Du, 2010).

Excluding Vulnerable Groups from Capital Punishment

International human rights law bans the use of capital punishment for juveniles (persons under the age of 18), pregnant women and new mothers, and persons of limited mental capacity. Although international human rights instruments have not reached a consensus on the maximum age beyond which the death penalty cannot be imposed or carried out, the execution of people over the age of 70 is prohibited by

Article 4(5) of the ACHR⁴⁹ and the UN ECOSOC made a similar endeavor to recommend that states establish ‘a maximum age beyond which a person may not be sentenced to death or executed’ (United Nations Economic and Social Council, 1989).

The Eighth Amendment to the Criminal Law, which was approved in 2011, also identified a maximum age limit of 75, beyond which a person *in principle* may not be sentenced to death or executed in China. This ‘ceiling’ clause on the age of capital offenders has an exception, which says those beyond the age limit of 75 convicted of crimes involving ‘extreme cruelty’ would not be exempted (News Desk, 2010). This conditional exemption of the elderly from the reach of capital punishment represented an intentional legislative caveat made in response to disputes between conservative forces resistant to introducing a maximum age limit for people subject to the death penalty and people in favour of narrowing down the scope of offenders punishable by death.

As a matter of fact, the first draft of the Eighth Amendment, which was released for public debate and discussion in 2010, introduced an unconditional exclusion of old people above the age of 75 from punishment of death. It, however, received overwhelming public criticism and scepticism (Zhao, 2011) as some were worried that the amendment would encourage bureaucrats above the age of 75 to act corruptly, whilst others were concerned with the prospect that elderly people who committed heinous crimes would escape the ultimate punishment (Zheng, 2010).

⁴⁹ Article 4(5) of the ACHR

The public assumed that the interest groups endorsing the legislative changes in eliminating criminal responsibilities of the elderly were the rich, the powerful and the corrupt who sought loopholes to commit criminal offences at an old age and then be exempted from the long arm of the law. To them, the proposal received wide support from the community of legal professionals as well as government officials. That it was given the go-ahead from the top Party leadership makes the motivations behind the legislation particularly questionable.

I had the chance to observe a small-scale, closed-door round table meeting, which was organized by national legislators and participated by their consultants, mainly renowned scholars in September 2010 in China. The meeting was set up to discuss the draft of the Eighth Amendment and more than 3900 responses that legislators collected from internet users. Quite a few scholars participating in the meeting supported the introduction of an unconditional maximum age limit for capital offenders and agreed that the maximum age limit should be further lowered to 70. However, the legislators recognized that they had to be sensitive to the considerable popular resistance from the online community. In order to push forward the reforms without undermining public trust in legislative authorities, they concluded at the meeting that some compromise had to be reached. As expected, five months later, the final Eighth Amendment adopted by the NPC introduced the exceptional clause into the Eighth Amendment. This case of legislative compromise showed the tensions between the elites and the populace and revealed how the conflicting interests and beliefs among different groups of people can shape the reform process of China's capital punishment regime.

Despite the recent legislative moves, there remain gaps between the Chinese law and international standards regarding the protection of vulnerable groups of capital offenders, since the reform initiatives did not touch areas such as new mothers and the mentally ill. Article 49 of the 1997 Criminal Law forbids the imposition of capital punishment on women who are pregnant at the time of trial. Official legal instruments have interpreted the term 'trial' to include all stages of the criminal proceedings brought against the defendant following case filing. In other words, if the defendant gets pregnant at any time during any stage of case filing, investigation, detention, instituting prosecutions, trials and conviction, she should be exempted from not only the immediate execution, but also the suspended execution for two years, even if child birth, miscarriage or abortion occurred in the subsequent proceedings before final conviction (The Supreme People's Court, 1991; The Supreme People's Court, 1998; Zhao, 1996: 318). This was a great improvement compared to the 1979 Criminal Law. However, neither the Criminal Law nor supplementary criminal ordinances made clear whether women who were discovered pregnant after the conviction and before the execution should be excluded from the death penalty. Moreover, new mothers have yet to be exempted from the scope of capital punishment in China.

Furthermore, Chinese law and practices lagged behind international standards in regards to provisions disqualifying the mentally ill from capital punishment.

International human rights law use a variety of medical and psychiatric terms to define the abnormal mental state of capital defendants, including 'the insane', 'mental retardation', 'extremely limited mental competence', 'mental disorder', and 'intellectually disabled'. A close reading of related international instruments reveals

that there are ever-expanding categories of the mentally incompetent being excluded from the ambit of capital punishment. In 2005, the UN seventh Quinquennial Report on Capital Punishment suggested that the safeguard to protect the insane and persons suffering from mental retardation or extremely limited mental competence from capital punishment be reformulated in line with the recommendation of the Commission on Human Rights to include 'any form of mental disorder' (United Nations Economic and Social Council, 1989: para. 1(d)).

In Chinese criminal statutes, mental capacity has been linked to the terms of 'criminal capacity' or 'the ability to take criminal responsibility'. Article 18 of the 1997 Chinese Criminal Law defined such a capacity as the ability of the offender to recognize or control his behaviour at the time of offence. It stipulates three degrees of criminal capacity: full criminal capacity, diminished criminal capacity, and criminal incapacity. A person suffering from a mental disease or defect that fully destroys that person's capacity to appreciate the unlawfulness or nature of his conduct or the capacity to control his conduct is exempted from the imposition of capital punishment. This provision suggests that only the mental state of the offender when he commits the crime matters; if he became insane at a later stage from trial to execution, he is still subject to the death penalty. To this effect, article 18 (2) confirms that 'a person who is intermittent insane shall bear criminal responsibility if when he commits the crime he is in a normal mental state'. This stands as a departure from the international human rights standards, which bars punishment of mentally disordered persons by death 'whether at the stage of sentence or execution' (United Nations Economic and Social Council, 1989).

Moreover, the Chinese criminal statutes have failed to exempt those suffering from certain mental disorders from capital punishment. Mentally disordered persons such as ‘mental retardation’, ‘extremely limited mental competence’, ‘mental disorder’, and ‘intellectually disabled’ are still subject to capital punishment, in contrast to international standards. Article 18 (3) provides that any person with diminished criminal capacity should be responsible for the consequences of his criminal conduct but he *may* be charged with a lesser offence or his sentence *may* be mitigated. In other words, diminished criminal capacity *per se* is neither an affirmative defence nor a mitigating factor in an absolute sense. Mitigation of the criminal liability of a defendant who ‘has not completely lost his ability to control or recognize his behaviour when he commits a crime’⁵⁰ is discretionary rather than mandatory even if the defendant’s diminished capacity is verified upon evaluation by forensic mental health specialists. As long as his ability to control and recognize his conduct is not *completely* lost, he at most can be excused from the death penalty if the judge, who is without professional knowledge of psychiatry, determines to do so. Alternatively, he will probably serve a prolonged period of confinement in prison, rather than in a psychiatric clinic, because his mental status is considered to be of diminished capability. Neither the Criminal Law nor any other legislation or guidelines elaborates on the specific standards according to which a person with diminished capacity should or should not be exempted from the death penalty.

⁵⁰ The 1997 Criminal Law of People’s Republic of China, article 18 (3).

The gaps between Chinese law and international standards probably contributed to the heated Sino-West debate in the case of Akmal Shaikh⁵¹, which will be further discussed in later chapters. In this case, family members of the defendant and human rights NGOs representing his family claimed that he suffered from bipolar disorder and that his illness should be considered as a mitigating factor during the trials. However, according to Chinese criminal Law, the judge hearing his case was entitled to sentence him to death if he was convinced that the evidence provided by Shaikh and his family was ‘insufficient’⁵² to prove that his mental capacity to distinguish or control his own behaviours were completely lost when he was arrested with nine pounds of heroin. Furthermore, in Chinese law, the defendant does not have the power to initiate the psychiatric appraisal procedure. If state authorities – the police, the procuracy and the courts – decide not to conduct a psychiatric appraisal of the defendant, the defendant has to be considered criminally liable (Chai, 2011; Zhang, 2010). As a result, Chinese state authorities refused to bow to international pressure and Shaikh was sentenced to death on 29 October 2008 and executed by lethal injection on 29 December 2009 (Eimer, 2009c; Eimer, 2009a).

The Method of Execution: From Bullets to Needles

Whereas there is an emerging international consensus rejecting the use of capital punishment as it fundamentally violates the right to life (Schabas, 1996), issues concerning the implementation and administration of the death penalty are also

⁵¹ Akmal Shaikh was a Pakistani-British businessman who was convicted and executed in the People's Republic of China for drug trafficking.

⁵² The protection of mentally ill from being prosecuted, convicted and punished is insufficient for even Chinese nationals. A *Global Times* article commented on the accusations from the West that China executed a vulnerable mentally ill person: ‘China has its own definition of mental illness and by that he is deemed to be mentally sound’. (Commentator, 2009)

relevant to the prohibition of cruel, inhuman or degrading treatment or punishment. The Commission on Human Rights, in its resolutions 2003/67, 2004/67 and 2005/59 on the death penalty, urged Member States to ‘ensure that, where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering and shall not be carried out in public or in any other degrading manner, and to ensure that any application of particularly cruel or inhuman means of execution, such as stoning, is stopped immediately’ (United Nations Commission on Human Rights, 2003; United Nations Human Rights Commission, 2005b; United Nations Human Rights Commission, 2005a). This ‘minimum suffering’ requirement has been incorporated into the OSCE International Standards of the Death Penalty (OSCE, 1989).

While the 1979 Chinese Criminal Law stipulated that shooting was the sole method of execution, article 212 (2) of the 1996 Criminal Procedure Law allows the use of both lethal injections and shooting to execute offenders. This legislative introduction of lethal injection as a means of execution, reportedly aimed to keep to a minimum the suffering of condemned prisoners (Spencer, 2008). Since the first execution by intravenous lethal injection of a fatal dose of potassium cyanide was carried out in Kunming, the capital city of Yunnan province in southwest China, in March 1997 (Zhou, 2009), the state-level judicial authorities have been in the process of replacing executions by shooting with this more ‘civilized’ alternative, as well as regulating and improving lethal injection procedures.

Although lethal injection as an execution method has been challenged in the U.S. because it could inflict ‘excruciating pain’ on prisoners,⁵³ in China it is nevertheless considered a more humane method than shooting. There has rarely been debate about the legitimacy or constitutionality of lethal injections in China. Liu Jiachen, vice-president of the Supreme People's Court, said the adoption of lethal injections had been welcomed by condemned prisoners, their families and people from all sectors of society (Reporter, 2002). Lethal injection is considered to be ‘the last privilege’ of the prisoners and is reserved for a small group of people on death row – namely corrupted officials and condemned prisoners who attracted nationwide public attention in high-profile capital cases. It is suspected that prisoners condemned to death are not commonly offered a choice of injection over gunshot in local areas where the judicial budget is tight, but wealth and connections can buy the newer and purportedly less painful method (MacLeod, 2006; Pan, 2008; Xiong, 2009).

Local courts, however, faced considerable practical difficulty when replacing shooting with lethal injections. The primary concern for them was the high cost associated with promotion of lethal injections. Before drugs were provided by the SPC for the intermediate people’s courts for free in 2008, cocktails of drugs for lethal injections were much more expensive in comparison with shooting.⁵⁴ Transportation was also expensive: local courts had to send at least two staff to collect the drugs

⁵³ Of the 35 U.S. states that allow the death penalty, all now execute by lethal injection. The use a sequence of drugs is supposed to provide a painless death, but when it is administered incorrectly it can fail to ensure that the inmate is unconscious and cause agony that amounts to unnecessary pain and suffering. *Baze v. Rees* 553 U.S. 35 (2008) (Ginsburg, J., dissenting)

⁵⁴ The Yuan is the basic Chinese currency unit, also known as ‘Renminbi’. 1 Chinese Yuan was traded for £ 0.0952 on 25 March 2011. ‘Chinese Yuan (CNY) in British Pound Sterling (GBP)’ (Google Finance, 25 March 2011) <<http://www.google.com/finance?q=CURRENCY%3ACNYgbp>> accessed 25 March 2011

from Beijing, where the SPC resides, every time there was an execution planned. Besides, investment required for facilities was also huge: an executing chamber costs at least a million yuan, and one set of new executing equipment costs several hundred thousand yuan (MacLeod, 2006; Cheng, 2006). In contrast, Hu Yunteng, the director of the Research Office of the SPC, told the *China Youth Daily* that a bullet costs less than 1 yuan. On average, execution by shooting costs just 700 yuan per prisoner, which includes the fees for cremation, transportation of the corpse and the bone ashes, and putting up the placard (Zhou, 2009).

As such, there has been enormous regional disparity in the methods of execution today. In a metropolitan area such as Beijing, an independent two-story building was constructed as the capital city's second⁵⁵ lethal execution site (Reporter, 2009d), and there was a plan⁵⁶ to execute all prisoners by lethal injections by the end of 2010 (Li and Hou, 2009; Chen, 2010b). While some local courts execute prisoners using death vans because of their relatively cheaper cost and mobility as an alternative to execution chambers, in other local areas with tighter budgets allocated to courts, prisoners are still being executed by shooting. Even in those areas where lethal injections are administered, the practice is far from uniform.

As of 2009, unofficial sources revealed that the cocktail of drugs used for injections in China was composed of barbiturate (high doses), muscle relaxant and potassium chloride (high concentration), which must be collected by local courts from the SPC

⁵⁵ Before then, only Qincheng Jail in Beijing, which imprisons high-level officials on death row, used lethal injection (Hans Off Cain, 2010).

⁵⁶ There were no follow-up media reports about this plan.

(Baidu Online). The standard procedure is claimed to be painless, because the anaesthetic agent, injected first in the sequence, is supposed to be capable of rendering the prisoner unconscious. The executors will first insert the needle and load the drugs into the lethal injection syringes. The three drugs will then be injected in sequence either manually or electronically by lethal injection machines, controlled by a computer. In the manual module, four executors start the syringes simultaneously but only one of them contains lethal drugs so that they do not know who actually injected the drugs necessary for execution, in order to assuage their guilt. During the execution, the condemned person's cardiac rhythm is monitored. Death is pronounced after cardiac activity stops (Zhou, 2009; Li and Hou, 2009; Reporter, 2009d). In practice, however, this procedure varies depending on the administrator of executions. According to Liu Renwen, a death penalty scholar from the Chinese Academy of Social Sciences, lethal injections have been administered by different parties – medical practitioners, coroners, or bailiffs – across different regions in China. Facilities and settings inside the execution chamber also vary greatly (Zhou, 2009).

As mentioned above, the switch from shooting to lethal injections promoted practices of executing prisoners inside mobile death vans, a convenient and affordable method for some poor local regions and rural areas. In 2006, Li Zuliang, President of the Intermediate Court of Zun Yi City, Gui Zhou Province, explained to news reporters that in practical terms it was time-consuming and expensive to transport all capital prisoners detained in the 14 nearby counties to Zun Yi City for the administration of lethal injections, therefore it made sense to use 'death vans' to shuttle from town to town (Cheng, 2006). It is also much cheaper to purchase a death

van than to build an execution chamber as local courts with low budgets, eager to use the more civilized method of executions, normally could not afford the latter. This practice of ‘executions inside death vans’ was met with cynical criticism by overseas human rights activists, including the claim by Amnesty International that injections in death vans facilitates illegal organ harvesting.⁵⁷ As such, this way of execution gradually lost its popularity. Recently, execution by lethal injections has been more affordable to local courts with growing subsidies from the government across different regions (Johnson and Zimring, 2009: 275) and central authorities. For instance, to financially help local courts replace shooting with lethal injections, the SPC started to offer free drugs for lethal injections to lower courts in 2008 (Reporter, 2008).

Although no detailed timetable was given, in November 2009 it was reported that state authorities determined to use lethal injection as the sole method of execution (United Nations Economic and Social Council, 2009). By January 2008, half of China's 404 Intermediate-level People's Courts – which carry out most of the country's executions – had adopted the use of lethal injections, according to Jiang Xingchang, vice-president of the SPC (Xie, 2008; Stanway, 2008). The on-going transition from bullets to needles occurring in China is ‘undoubtedly a message meant for audiences both domestic and foreign’ (Johnson and Zimring, 2009: 275) that the Chinese government has endeavoured to civilize and humanize its administration of the death penalty. According to Chinese media reports, practical considerations such as public health are also behind the transition: the first group of

⁵⁷ It was reported by the state media in August 2009 that two-thirds of organ donors in China were executed prisoners (MacLeod, 2006; Hans Off Cain, 2010).

offenders who received lethal injections in 1997 in Yunnan, a southwest province with the highest rate of drug crimes, were mostly drug traffickers who were HIV carriers. The government believed that spread of the viruses could be prevented by avoiding blood-splattering executions from shooting. Interestingly, this change in the execution method was initially met with strong opposition from the public who demanded a more brutal, eye-for-an-eye execution method.⁵⁸ It took a while before the public generally accepted lethal injections as a more humane approach of executions so that the suffering of the condemned prisoners can be reduced.

While international human rights jurisprudence forbids public executions, such practices have died out in China. However, the Strike-Hard-style sentencing rallies, intended to stigmatize prisoners before being transported to execution sites, did not completely disappear. The media nationwide were flooded with news and photographs of sentencing rallies and parades aimed to shame offenders in various provinces⁵⁹ during the high tide of this Strike Hard campaign (Zhu, 2010) and is proof of the longevity of such a hard-to-eradicate practice in local areas. Although public parading of prisoners who were about to be executed was forbidden by the national level authorities as early as 1984, such spectacles remained commonplace, especially in the countryside through the 1980s and 1990s. Rumours of executions in sports stadiums plagued China's bid for the 2008 Olympics, and forced Beijing to convey a message to a foreign audience that public executions were no longer

⁵⁸ Over 56% of the respondents in a survey believe that prisoners sentenced to death for outrageous crimes should be executed by more painful method of shooting instead of lethal injections. See (Reporter, 2009d; Reporter, 2009b)

⁵⁹ According to online news reports, various cities and counties of at least nine provinces, including but not limited to Hunan, Yunan, Hubei, Jiangsu, Guangdong, Shangxi, Guizhou, Guangxi, Sichuan, held such publicized sentencing rallies in 2010.

officially permitted in China (Kamm, 2010). In July 2010, the government called for an end to the use of ‘shaming’ by the police even in non-capital cases, after a popular protest carried out on the internet in objection to a series of ‘shame parades’ that forced shackled prostitutes to parade in public (Jacobs, 2010). Nevertheless, shaming parades and sentencing rallies were still seen in some local areas in November 2010⁶⁰.

Improving Due Process Safeguards in Capital Cases

Article 10 of the UDHR, Articles 6(2) and 14(1) of the ICCPR,⁶¹ Article 6(1) of the ECHR, Article 7 (1) (b) of the ACrHPR, Article 8(1) of the ACHR, and No. 5 of the ECOSOC Safeguards require that capital defendants are entitled to a fair and public hearing before a competent, independent and impartial court or tribunal established by law. To this effect, defendants should be provided with various specific rights including a presumption of innocence,⁶² the requirement of clear and convincing evidence,⁶³ a fair opportunity to answer the charges brought against him or her, trial

⁶⁰ See (Sina Video, 2011). Video clips showing the above sentencing rally also appeared in another major internet sites in China such as tv.sohu.com (see <http://tv.sohu.com/20101103/n277068302.shtml>)

⁶¹ Article 14 is of a particularly complex nature, combining various guarantees with different scopes of application. The first sentence of paragraph 1 sets out a general guarantee of equality before courts and tribunals. The second sentence of the same paragraph entitles individuals to a fair and public hearing by a competent, independent and impartial tribunal established by law... Paragraphs 2-5 of the article contain procedural guarantees available to persons charged with a criminal offence. Paragraph 6 secures a substantive right to compensation in criminal cases involving miscarriages of justice. Paragraph 7 prohibits double jeopardy and thus guarantees a substantive freedom.

⁶² By reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. See Article 14 (2) of the ICCPR; Article 6 (2) of the ECHR; Article 8 (2) of the ACHR; Article 7 (1) (b) of the ACrHPR; and No. 4 of the ECOSOC Safeguards.

⁶³ Safeguard No. 4 of the ECOSOC resolution 1984/50 of 25 May 1984 on ‘Safeguards guaranteeing protection of the rights of those facing the death penalty’, which states: ‘Capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts.’

without undue delay,⁶⁴ equality of arms before the courts (including the right to be informed,⁶⁵ the right to have adequate time and facilities for the preparation of his defence and the right to communicate with counsel of his own choosing,⁶⁶) the right to present during the trials,⁶⁷ the right of defence (including the right to counsel),⁶⁸ the right to have legal assistance/aid,⁶⁹ the right to have the witnesses examined and cross-examined in court,⁷⁰ the right to have free assistance of an interpreter as a foreign language speaker,⁷¹ the right not to be compelled to testify against himself or

⁶⁴ This guarantee relates not only to the time by which a trial should commence, but also the time by which it should end and judgement be rendered; all stages must take place "without undue delay". To make this right effective, a procedure must be available in order to ensure that the trial will proceed 'without undue delay', both in first instance and on appeal. Article 14 (3) (c) of the ICCPR; Para.10, General Comment 13, U.N. Doc. HRI/GEN/1/Rev.6 at 135 (2003); Article 6 (2) (c) of the ECHR; Article 7 (1) (d) of ACrHPR; and No. 5 of the ECOSOC Safeguards.

⁶⁵ Article 14 (3) (d) of the ICCPR; Article 8 (2) (b) of the ACHR; and Article 6 (3) (a) of the ECHR.

⁶⁶ Article 14 (3) (b) of the ICCPR; Article 6 (3) (b) of the ECHR; Article 8 (2) (c) of the ACHR; Article 7 (1) (d) of the ACrHPR; No. 5 of the ECOSOC Safeguards; Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty; Reid v. Jamaica (No. 250/1987), para. 11.3; *Smith v. Jamaica*, para. 10.4; the Annual Report of the Human Rights Committee, 1998, UN Doc. 53/40, para. 82; and *Little v. Jamaica*, para. 8.4.

⁶⁷ ICCPR, article 14 (3) (d).

⁶⁸ The right of defence includes, but is not limited to the right to meet with the lawyer in private, to see the file and to have access to evidence. It requires counsel to communicate with the accused in conditions giving full respect for the confidentiality of their communications. Lawyers should be able to counsel and to represent their clients in accordance with their established professional standards and judgement without any restrictions, influences, pressures or undue interference from any quarter. Legal assistance to the accused in a capital case must be provided in ways that adequately and effectively ensure justice. In cases involving capital punishment in particular, legal aid should enable counsel to prepare his client's defence in circumstances that can ensure justice. This does include provision for adequate remuneration for legal aid. See Article 14 (3) (d) of the ICCPR; Article 6 (3) (c) of the ECHR; Article 8 (2) (d) of the ACHR; Article 7 (1) (c) of the ACrHPR; No. 5 of the ECOSOC Safeguards; Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, ESC Res. 1989/64; Extrajudicial, Summary or Arbitrary Executions: Report by the Special Rapporteur, UN Doc. E/CN.4/1997/60, para. 81; and Para.9, General Comment 13, U.N. Doc. HRI/GEN/1/Rev.6 at 135 (2003).

⁶⁹ Article 14 (3) (d) of the ICCPR; Article 8 (2) (e) of the ACHR; and No. 5 of the ECOSOC Safeguards.

⁷⁰ It requires that the accused shall be entitled to examine or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. This provision is designed to guarantee to the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution. Article 14 (3) (e) of the ICCPR; Article 6 (3) (d) of the ECHR; Article 8 (2) (f) of the ACHR; *Grant v Jamaica* (No. 250/1987), para. 8.5; *Yassen and Thomas v. Guyana*, para. 7.10; and Para.12, General Comment 13, U.N. Doc. HRI/GEN/1/Rev.6 at 135 (2003).

⁷¹ This right is independent of the outcome of the proceedings and applies to aliens as well as to nationals. It is of basic importance in cases in which ignorance of the language used by a court or difficulty in understanding may constitute a major obstacle to the right of defence. Article 14 (3) (f) of the ICCPR; Article 6 (3) (e) of the ECHR; Article 8 (2) (a) of the ACHR; and Para.13, General Comment 13, U.N. Doc. HRI/GEN/1/Rev.6 at 135 (2003).

to confess guilt,⁷² the right to special procedure safeguards tailored for the special needs of juveniles,⁷³ and the right to information on consular assistance.⁷⁴

There have been great gaps between the Chinese law and practices of capital trial, appeals and review process and the due process safeguards as required by international human rights law. Although China's first ever National Human Rights Action Plan released in April 2009 promised that 'the state, in accordance with law, guarantees the rights of litigants, especially those charged with criminal offences, to an impartial trial' (The Information Office of the State Council, 2009: II (3)) and the Chinese government made assurances to the United Nations (hereinafter the UN) Special Rapporteur on various occasions that there was strict adherence with due process guarantees in capital punishment cases (Knaul de Albuquerque e Silva, 2010: paragraph 213), judicial procedures and process in capital cases remain flawed. A highly politicized judiciary, secondary to the authority of the Party-state's political and legal committees at every level, can be frequently reduced to a proxy of political interests (Reporter, 2005; Human Rights Watch, 2008; Cohen, 2008). An Amnesty International report in 2006 claimed that no one sentenced to death in China received a fair trial in line with international human rights standards because they did not always have prompt access to lawyers, capital defendants were not normally afforded a presumption of innocence, political interference in the trial process and

⁷² Article 14 (3) (g) of the ICCPR and Article 8 (2) (g) of the ACHR

⁷³ Article 14 (4) of the ICCPR and Article 6 (1) of the ECHR

⁷⁴ Article 36 § 1 (b) of the Vienna Convention on Consular Relations; The Right to Information on Consular Assistance in the Context of the Guarantees of Due Process of Law, para. 124; in resolution 2005/59, adopted on 20 April 2005, the UN Commission on Human Rights urged all states that still maintain the death penalty 'to comply fully with their international obligations, in particular with those under article 36 of the Vienna Convention on Consular Relations, particularly the right to receive information on consular assistance within the context of a legal procedure, as affirmed by the jurisprudence of the International Court of Justice and confirmed in recent relevant judgements'.

manipulation of the outcome of trials were commonly seen, and courts commonly failed to exclude evidence extracted through torture as basis of conviction and sentencing (Amnesty International, 2006).

The nation-level judiciary in China, along with other political and legal authorities, has since then taken a range of measures to perfect the faulty judicial procedures involved in capital trials, sentencing and reviews to ensure the protection of the rights of capital defendants. These reform measures include creating opportunities for defence attorneys to present oral arguments in death penalty appeals, hearing second-instance capital trials in open courts (2006) (Johnson and Zimring, 2009: 271) , issuing guidelines to exclude illegal evidence in capital trials (2010), protecting defence lawyers' role in capital cases (2008)⁷⁵, creating sentencing standards for the adjudication of certain capital cases (on-going)⁷⁶, amending the Criminal Procedure Law to require the recording of interrogations (2012), and most notably, reinstating the SPC's authority to review all death sentences nationwide (2007). Table 3.1 in the Appendix summarizes various reform guidelines published in recent years by political and legal authorities at the state-level.

⁷⁵ On 22 May 2008, the Supreme Court and the Ministry of Justice of China jointly issued regulations on the protection of defence lawyers' roles in capital cases to ensure that defendants' legal rights were upheld.

⁷⁶ The Second Five Year Reform Plan of the People's Courts issued in 2004 proposed to make sentencing guidelines and unified standards in capital cases. (The Supreme People's Court, 2006) Since then, there has been an on-going effort by the SPC to make unified sentencing standards in certain categories of capital cases across different regions of China. The aims of these reform initiatives are two-fold: to prevent miscarriages of justice in capital trials and to reduce the regional variation of capital sentencing. In late January 2007, a SPC judge Lu Guanglun said that the SPC was considering introducing sentencing guidelines for at least four types of capital cases that make up more than 90% of all death penalty sentences in China: murder, aggravated assault, robbery and drug trafficking. (Reporter, 2007)

Central to all these reform initiatives focusing on affording defendants due process safeguards in capital cases was the restoring of the judicial review power by the SPC in January 2007, a component of the Second⁷⁷ Five Year Reform Plan of the People's Courts (2004-2008). The Reform Plan listed 'reforming and improving trial procedure in capital cases' and 'reforming and perfecting review procedure in capital cases' at the top of a series reform measures aimed at improving judicial practices. This confirmed that the SPC is the sole body to exercise the power to review death penalty decisions (The Supreme People's Court, 2006: point 2), and anticipated the establishment of sentencing guidelines for judges hearing cases involving murder, robbery, intentional injury, and drug crimes, etc., so that the sentencing procedure can be improved and perfected (The Supreme People's Court, 2006: point 11). The recall of the review power over capital cases by China's top judiciary was the outcome of a long-awaited process of regulating, consolidating and centralizing the penal power in capital cases promoted by various domestic and international forces. In almost 50 out of the 57 years of pre-2007 Chinese penal history, local courts – mainly the HPCs – held the power to review capital cases. Various attempts to recall that power back to the SPC had never been successful before 2007. To this extent, the former president of the SPC, Xiao Yang, commented in 2006 that this reform measure was the 'boldest move in China's judicial reform', and it was an essential step in improving the fairness in capital trials and to curtail the use of the death penalty in China (Xiao, 2006).

⁷⁷ The SPC has to date issued the first, second and third Five Year Reform Plan of the People's Courts respectively in 1999, 2004 and 2009. The first Five Year Reform Plan of the People's Courts (1999-2003) proposed that the second instance capital cases should be held in open courts if key facts and evidence of the case are in dispute, if the appellant presents new evidence or facts, or where the case could have considerable impact among the public (Zhu, 1999).

As a first step, in October 2006, the SCNPC adopted an amendment to revise Article 13 of the Organization Law of the People's Courts in China so that the SPC will have exclusive jurisdiction over the final review and approval of all death penalty cases. This amendment replaces the existing language in Article 13 which requires the SPC to delegate its authority to review certain death penalty sentences (those relating to serious crimes such as murder, rape, robbery and the criminal use of explosives) to provincial-level high people's courts when necessary. This revision of the Organization Law cleared the legal obstacle for the SPC to recall its review power. In addition, three criminal divisions were established within the SPC; the State Council provided special funding for the new office buildings; and to ensure there was sufficient staffing in the SPC for the increasing caseloads after the recall of review power, a large number of well-trained judges and lawyers and new graduates from law schools were recruited nationwide to staff these new divisions (Zhang, 2006; Xiao, 2006).

Chen Ruihua, a renowned scholar in the field of criminal procedure law, described the recall of the review power as 'pulling one hair and the whole body is moved' (*qian yi fa er dong quan shen*) (Chen, 2008b). In other words, he believed that the significance of recalling the review power was not limited to introducing a final 'safety valve' procedure to guard against miscarriages of justice. Most importantly, by tightening its supervision and checks on the discretionary power of provincial and local judicial bodies (Johnson and Zimring, 2009: 228), the SPC pressured first instance and second instance courts to rigorously implement the policy of 'kill fewer,

kill cautiously' (*shao sha shen sha*) and move towards moderation and leniency at capital trials. In other words, with review power residing in the SPC, if there is any error in the application of law or admission of evidence in the lower courts' decision, or that the lower courts sentenced the defendant to death while the defendant could be sentenced to lesser punishment (*ke sha ke bu sha*) according to law, it is likely that these cases would be overturned or sent down to lower courts for a retrial (Xinhua News Agency, 2007). The judges at lower courts, therefore, would restrain from meting out death sentences in absence of legally-obtained, 'hard' evidence (Zhang et al., 2011), for fear that their cases could be overturned by the top judiciary (Zhao, 2011).

Therefore, before the review power was recalled by the SPC, even if the appellant court judges knew that the decisions of trial judges may be erroneous in the application of law or that the decisions were based on illegally obtained evidence, they could still approve the death sentence due to political pressure, local interests or personal connections. Judges at lower courts in the post-reform era exercise greater care in deciding capital cases (Scott, 2010), as they know that their decisions could be overturned with the rigorous scrutiny provided by the SPC. But why do judges at lower levels care about whether the capital cases heard by them are overturned by the SPC? My interviews with judges and prosecutors at the provincial level judicial authorities found that the 'ratio of capital cases overturned and sent back for retrials by the SPC' (*gai pan fa hui li*) – a ratio calculated by dividing the number of capital sentences that are not eventually approved by the SPC by the total amount of capital sentences meted out by a lower-level court – was adopted as a criterion to appraise

the capacity of lower courts to implement the reform policies and the competency of individual judges. In essence, this ratio is pegged to the performance of judges as well as lower courts. Therefore, if the decisions made by a judge are frequently overturned by the SPC, this judge will be deemed as incompetent, his salary will remain low and there is great chance that he will not get promoted to better positions. Similarly, if the decisions heard by all the judges within a court are frequently overturned by higher authorities, the court as an institution will be considered unwilling to follow the instructions 'from the top'.

This is why judges in lower courts, with less discretionary power in the post-reform era, had strong incentives to exercise greater cautiousness in capital trials so that their cases would be more likely approved by the SPC's review procedure. After all, capital cases remained the most-watched category of penal cases in the public eye. If serious and obvious errors in the trial or appellant level attract the attention of journalists and the public, there is a great possibility that judges handling these high-profile cases be disciplined and even held criminally responsible under the Scheme of Reinvestigation of Misjudged Cases.

A series of new guidelines were issued by the SPC to instruct lower courts to further limit the application of the death penalty to a small number of 'extremely serious' cases in 2010. The SPC issued Guidelines on Handling Criminal Cases with a Policy of 'Tempering Justice with Mercy' on 8 February 2010 (The Supreme People's Court, 2010). The 'Tempering Justice with Mercy' guidelines stated that the death penalty must be meted out to those who have committed 'extremely serious' crimes and

caused great harm to the society, so that criminals and those who disturb the stability of the society can be sufficiently and effectively deterred.

Although this guideline confirmed that the death penalty should only be reserved for the tiny minority of criminals against which there is valid and ample evidence and that leniency should be granted whenever possible, the top judiciary also emphasized that those who commit serious crimes must be punished *severely* and sentenced to death according to law *uncompromisingly* (Xinhua News Agency, 2010: paragraph 6; Reporter, 2010a). It has also been mentioned in the guidelines that judges dealing with capital cases need to avoid both excessively punitive and *overly lenient* tendencies. (The Supreme People's Court, 2010: paragraph 2) While emphasis was placed on the restrictive use of penal punishment in general and capital punishment in particular, no new progress was shown in the guidelines – the groups of crimes and offenders which were punishable by merciful sentences according to the guidelines were merely a repeat of existing penal legislation.

The 'Tempering Justice with Mercy' guidelines suggest that the shift in the penal policy arena from the Strike-Hard-era ethos of 'punishing harshly and swiftly' to 'kill fewer, kill cautiously' in the death penalty reform era is not complete and irreversible as many people thought. Indeed, the new leadership of the SPC still use the same rationales – deterring those who deserve the heaviest penal sanctions to maintain social stability – to justify the employment of capital punishment as a social control strategy to punish targeted groups of criminal offenders. Three years into the death penalty reform, there have been signs of re-emerging punitive, populist penal ethos.

Wang Shengjun, who replaced the reform-minded jurist Xiao Yang to be the new President of the SPC, stated publicly that capital cases should be decided based on the ‘feelings of the society and the masses’, rather than law. Indeed, although capital punishment reforms were still inching forward in certain areas, such as excluding illegal evidence⁷⁸ and drafting new sentencing guidelines, these ‘new progresses’ were in fact envisioned by the reformers five years ago in the Second Reform Plan. To a certain extent, the new development was an outcome of the inertia of the reform process around mid-2000s. The pace of capital punishment reforms has already slowed down, if not halted.

Additionally, the Third Five Year Reform Plan of the People's Courts (2009-2013) has just one sentence about the death penalty reform, which states that the review procedure in capital cases should be further improved and the ‘quality and efficiency’ of the judicial review are to be increased. This was the latest Five Year Reform Plan issued by the SPC (The Supreme People's Court, 2009) to date. However, it would be an overstatement to suggest that Wang Shengjun’s policy with respect to the death penalty is qualitatively different from that of Xiao Yang. At most, the differences are in degree, not in kind. In 2006, before the eve of the recall of the review power by the SPC, Xiao Yang made it clear that ‘after the review power is restored to the SPC, we must continue to punish serious criminal conducts severely. Those serious crimes which should be sentence to immediate execution must be punished accordingly

⁷⁸ The Provisions on Certain Issues regarding Examining and Ascertaining Evidence in Capital Cases was issued jointly by the SPC, the SPP, the Ministry of Public Security, the Ministry of State Security, and the Department of Justice on 13 June 2010. The Provisions on Certain Issues regarding Examining and Ascertaining Evidence in Capital Cases bans any evidence of unclear origin, confessions obtained through torture, or testimony obtained through violence and intimidation.

without hesitation. If we cannot keep punishing serious criminal offences harshly, we cannot prevent and reduce the rate of crimes, maintain social stability and harmony, or satisfy the Party and the people.’(Xiao, 2006)

Transparency

International human rights law requires full and accurate publication of the number of death sentences imposed, the types of offences for which the death penalty has been imposed, the grounds for the sentences imposed, the number of executions carried out, the manner of execution, the identity of the prisoners executed, the number of death sentences reversed or commuted on appeal, and the number of instances in which clemency has been granted. Various international institutions and individuals, including the UN Commission on Human Rights, the UN ECOSOC, the UN Human Rights Committee, and the UN Special Rapporteur on extrajudicial, summary or arbitrary executions all called upon states to pierce the secrecy around the sentencing to death and execution of prisoners.⁷⁹

The Chinese government, however, has never officially published any information regarding the annual number of executions and the number of death sentences imposed. Most statistics relating to the administration of the death penalty have been

⁷⁹ Concluding observations of the Human Rights Committee: Libyan Arab Jamahiriya, UN document CCPR/C/79/Add.101, 6 November 1998, para. 8; Concluding Observations of the Human Rights Committee: Syrian Arab Republic, UN document CCPR/CO/71/SYR, 24 April 2001, para. 8; Extrajudicial, Summary or Arbitrary executions: Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN document E/CN.4/2005/7, 22 December 2004, para. 87; ECOSOC, Implementation of the Safeguards Guaranteeing Protection of Rights of those Facing the Death Penalty, ECOSOC Res. 1989/64, UN Doc. E/1989/91 (1989); Commission on Human Rights resolution 2005/59, The Question of the Death Penalty (see Official Records of the ECOSOC, 2005, Supplement No. 3 and corrigenda (E/2005/23 and Corr.1 and 2), chap. II, sect. A).

classified as state secrets and individuals disclosing state secrets can be held criminally responsible. As Rosemary Foot has commented, the numbers of executions and death sentences remain China's most closely guarded state secrets (Foot, 2000: 85-87). As Johnson and Zimring have observed, the measurement of the use of the death penalty in China is often adjective – such as 'very small', or 'too large' – rather than in concrete numbers (Johnson and Zimring, 2009: 233).

The statistical black hole has been holding back independent and unbiased research on the death penalty (The Information Office of the State Council, 2009: II(5); Human Rights Watch, 2011). Human rights NGOs, foreign experts and researchers in the field of Chinese criminal law and criminology, Chinese officials, legal professionals and scholars often make widely different assessments as to the scale of executions and death sentences in China. There were considerable disagreements even amongst various human rights NGOs who regularly monitor the use of the death penalty in China. For example, compared to the estimation made by Amnesty International that 'at least 1,718' people were executed in China in 2008, Hands Off Cain believed that there were 'at least 5,000' executions (United Nations Economic and Social Council, 2009: 23).

Because of the scarcity of accurate information and the flawed data sets, it is hard to verify these estimates and projections made by various parties who have been exposed to different sources of information. Chinese scholars in the field of penal law and criminology, who are proximate to the sources of information held by state authorities, revealed higher annual number of executions. In March 2004, Chen Zhonglin, a scholar and a member of the NPC told news reporters that China carried

out 10,000 executions every year; in February 2006, Liu Renwen, a scholar from the Chinese Academy of Social Sciences, speaking at the Foreign Press Club, said that 8,000 people were executed each year (Hans Off Cain, 2010).

According to both Chinese and foreign scholars, the annual estimated figures of death sentences and executions in China published since the 1980s by Amnesty International are significant underestimations of the actual numbers (Zhao, 2010: 42; Johnson and Zimring, 2009: 235-236). Johnson and Zimring (2009) surveyed main data sources and employed the methodology of triangulation of proof, and concluded that the annual volume of executions could reach 15,000 or even more at the turn of the 21st century. This number is consistent with the execution figures included in the leaked CCP files (Nathan and Gilley, 2003) and the estimates made by Dui Hua director John Kamm (Yardley, 2007).

Since the launch of the death penalty reforms in the mid-2000s, despite the fact that the Chinese authorities have repeatedly claimed that the number of executions and death sentences have dropped since the recall of review power over capital cases by the SPC, it is difficult to verify this claim and identify actual trends in the use of capital punishment in China without solid data (Amnesty International, 2010).

However, the increasing citation of figures in official discourse, news reports, and journal articles with regard to the use of the death penalty has been a signal that there is slightly greater transparency. The annual work report submitted by the SPC to the

National People's Congress (hereinafter the NPC), which are publicly accessible,⁸⁰ include a statistical record kept for most of the years since the early 1980s – the number of people sentenced to a broad category consisting of fixed-term imprisonment above 5 years, life imprisonment, the death sentence with two-year reprieve and immediate executions. This figure is called 'the ratio of harsh penal sanctions' (*zhong xing lü*) by Chinese criminal law scholars (See Table 3.3 in the Appendix). However, this figure has been termed 'the world's most useless number' (Clarke, 2009), since it is impossible to extrapolate the precise annual number of death sentences in China because the percentage of immediate executions to the total category is unavailable. Nonetheless, even this intentionally ambiguous and marginally useful ratio has disappeared from the SPC annual work reports since 2010. The intentional removal of this 'ratio of heavy penal sanctions' from the SPC's published annual work reports may indicate that the state-level authorities, in particular the SPC under the leadership of Wang Shengjun, has once again tightened its control of information regarding the use of capital punishment.

Another set of figures published in the SPC work reports – the caseload of the SPC – became useful after the SPC recalled the review authority over all capital cases.

Although the claim that the annual volume of death penalty review cases from the year 2007 onwards accounts for around 90% of the SPC's annual total caseload is

⁸⁰ A compilation of annual SPC work reports (1980-2009) can be found at the website of the Central People's Government of the PRC, available at <http://www.gov.cn/test/2008-03/21/content_925627.htm> accessed 13 March 2011. Several annual reports are missing from this dataset (1996-2005), but can be located through search engines, for instance, the 1996 report is available at <http://www.court.gov.cn/qwfb/gzbg/201003/t20100310_2638.htm> accessed 10 April 2011.

questionable⁸¹, it is no doubt safe to extrapolate such a percentage out of the SPC's annual criminal caseload. A close reading of the work reports in 2006 and 2007 reveals that the total caseload of the SPC increased remarkably by 3,409 and the criminal caseload increased by 2,807 from 2006 to 2007, while the SPC's annual figure of criminal caseload from 2003 to 2006 slightly fluctuated (See Table 3.2 in the Appendix).

Since the total caseload of the SPC stayed stable at around 3,000 and the criminal caseload remained at around 400 for at least four years before 2007, and due to the fact that the review power over all capital cases was returned to the SPC on the first day of the year 2007, the sudden increase of 2,807 cases in 2007 indicates that capital review cases account for the vast majority of the difference. If the 90% stands, then the nationwide annual figure of capital cases resulting in sentencing of immediate execution at the second instance courts in 2007 would be approximately 2,890.

According to the news reports to be discussed in the next section, 10%-15% of these capital cases were commuted to lesser punishment after the conclusion of the review procedure⁸². Therefore, the number of cases resulting in final executions would be approximately 2,457 to 2,601. Yet it is still difficult to ascertain the number of annual executions because the ratio between the total of capital *cases* resulting in executions and the number of confirmed *prisoners* executed is unknown. In other words, it is uncertain how many defendants were sentenced to death on average. However, even

⁸¹ The SPC's jurisdiction covers criminal cases, civil cases, and administrative cases. For example, the work report of the SPC says that in 2006, the SPC heard 405 criminal cases, 673 civil cases, and 318 administrative cases. From 2003-2007, of the 24,501 cases heard by the SPC, only 4,802 were criminal cases. In particular, taking the year 2007 for example, out of the 7,077 total caseload of the SPC, only 3,212 are criminal in nature. See (Xiao, 2008; Xiao, 2007) cf. (Clarke, 2009; Ni, 2007).

⁸² My interview with legal professionals in four provinces across China confirmed the accuracy of such a percentage in those four provinces.

from this process of rough estimation, it is highly likely the number of executions in China in 2007 was below 4,000 as most capital cases would only result in one instance of execution.

Section Two. The Impact of the Recent Developments: A Brief Evaluation

It is difficult to make a complete and unbiased assessment of the practical significance of the recent death penalty reforms in China in the absence of reliable statistics. The influence of reform measures are hard to measure also because, as Zimring and Johnson (2009: 278) have observed, it is difficult to quantify the symbolic and ‘indirect’ effects of some reform initiatives . Specifically, the death penalty reforms may have triggered subsequent reconfiguration of other aspects of penal process and penal power structure which are not directly related to the administration of capital punishment. This said, China’s state-run media groups such as the *China Daily*, the *Global Times* and the *People’s Daily* are among the most active reporters and optimistic commentators about positive changes to law and practices – that the volume of death sentences has been declining ever since 2007 and that the chances of miscarriages of justice in capital cases have been greatly reduced. By December 2011, it was revealed at a seminar jointly organized by the UN Office of the High Commissioner for Human Rights and China’s Foreign Ministry that since the SPC regained the final review power over death sentences in January 2007, the

number of executions has dropped by approximately 50%⁸³ (Dui Hua Foundation, 2011).

Nonetheless, commentators from abroad seem to be more sceptical about the impact of the Chinese death penalty reforms. In his report issued in 2010, Manfred Nowak, the former Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment in the UN Office of the High Commissioner for Human Rights, concluded that ‘China has so far failed to take concrete steps to guarantee the right to legal counsel, the presumption of innocence and the right to remain silent’ (United Nations Human Rights Council, 2010: 37). He described the SPC death penalty review process as ‘just a rubber stamp’ and ‘not a substantive review’ of the actual cases even after the 2007 reform.⁸⁴ Similarly, Human Rights Watch (hereinafter HRW), in one of its reports in January 2011, documented a number of capital cases where the due process protections and the right to fair trials of condemned prisoners on death row were violated. The report supported such claims in reference to the refusal of the SPC to consider the role of torture in sentencing Chongqing entrepreneur Fan Qihang to death, a politically sensitive case due to its connection with a controversial regional anti-crime campaign launched in June 2009 by the city’s CCP chief Bo Xilai.

⁸³ If this stands, according to the estimation in the earlier sub-section, the volume of executions in the year 2011 in China would probably be less than 2,000, which remained extremely high compared with other retentionist countries and regions but significantly lower than during the Strike Hard years.

⁸⁴ Human Rights Watch interview Manfred Nowak, the special rapporteur on torture and other cruel, inhuman or degrading treatment or punishment in the UN Office of the High Commissioner for Human Rights, New York, October 29, 2010

According to HRW, the court's failure to consider evidence of torture in Fan's case raises serious doubts about the willingness of the SPC to consider mitigating factors in politically sensitive cases (Human Rights Watch, 2011). How can we access and analyse these conflicting views on the impact of China's death penalty reforms? I will base my assessment of the impact of the death penalty reforms in the following part of this chapter on evidence provided by the speeches and talks by Chinese government officials and legal professionals, existing research on the topic, and my own elite interviews with Chinese legal professionals in 2010.

The Significance of Reinstitution of the Review Power by the SPC

Jiang Xingchang, Vice President of the SPC, disclosed in September 2007 that the nationwide total of death sentences in 2006 was the lowest in about ten years; this figure during the first half of the year 2007 continued to decline compared to the same period of 2006 (Dong, 2007). A report released in September 2010 by the *China Daily* claims that the SPC had overturned 15% of the capital cases it reviewed in 2007 and in 10% of cases in 2008 (Wang, 2010). In another *China Daily* report, Hu Yunteng, head of the research department under the SPC, told reporters in November 2010 that since the SPC took back its review power over capital cases from lower courts in 2007, the SPC has overturned, on average, 10% of the death sentences meted out by appellant courts nationwide. Regaining the review authority, according to him, 'played an obvious role' in reducing the number of executions (Zhang and Wang, 2010). Johnson and Zimring (2009: 280-282) reported that the number of first-instance death sentences dropped from 10% in Beijing, to 40% in

Liaoning province, and to as high as 83% in a 'large city in north-western China' during the first year after the recall of the review power. According to them, returning the review power to the SPC 'must be considered' one of the most important causes of the claimed decline in death sentences and executions immediately after the reforms.

Although it is difficult to verify these figures announced by Chinese officials, it seems safe to presume that the reforms have resulted in a decrease in the use of capital punishment. My elite interviews with judges (in the SPC and higher people's courts), prosecutors (in SPP and provincial procuratorates) and legislators in 2010 found that these legal professionals believed that the single and most significant reform initiative to date has been the recall of the review power by the SPC. All of the 36 respondents considered the recall of the review power by the SPC and open trials in the second instance courts to be 'significant', 'huge', 'a landmark reform' for its evident importance in 'reducing the number of death sentences and executions', 'preventing miscarriages of justice', 'forcing local courts to abide by due process procedures', 'helping to exclude illegal evidence', 'encouraging the local courts, procuratorates, and public security department to exercise their duties according to law', 'protecting the rights of capital offenders', and 'triggering further reforms'.

Yet at least in some regions, the decline is non-linear. My interviews with Chinese legal professionals revealed that while it is true that the recall of the review power led to a significant decline in the volume of executions and capital convictions in 2007, the year 2009-2010 saw an increase in death figures across different regions in China. One interviewee reported that although in his province the figure with regard to

capital sentences and executions continued to drop for three years (2007-2010), the rate of decline has slowed down as trial courts have started to carefully scrutinize the evidence in capital cases and cautiously weigh aggravating circumstances against mitigating factors. In other words, as capital cases submitted for review by the SPC involve fewer errors in the application of law, flawed evidence or improper procedures, they are less likely to be overturned. In fact, my interview with a judge from the SPC revealed that out of all the capital cases reviewed by the SPC since 2007, 30%-40% of the cases were overturned because the trial courts or appellant courts failed to exclude inadmissible or illegally-obtained evidence. These capital cases account for the majority of the decline in death sentences and executions since the reinstatement of review power. The SPC judge reported that as time goes by, there are fewer such cases as lower courts begin to apply higher standards of scrutiny while reviewing evidence.

Yet the significance of the reinstatement to the SPC of its exclusive power to review and approve death sentences is not limited to cutting back the volume of the use of capital punishment. As Johnson and Zimring have commented, the 2007 reform invented a new process rather than restoring an old practice.⁸⁵ The authority to approve and review capital cases had been within the purview of local people's courts for almost 50 years out of China's 57 year contemporary history of criminal justice. Except for the nine year duration from 1958 to 1966, the SPC never had the power to review all capital cases in practice, although it has been granted the power to do so according to the letter of penal statutes. In other words, it has been the rule, rather

⁸⁵ See (Johnson and Zimring, 2009: 274). However, it may be useful to bear in mind that the current review procedure is not held in court sessions, rather, it is conducted through examining case files.

than the exception, that local courts have had the final say on whether a condemned prisoner should be executed in the past. Thus, the SPC never had well-established institutions or sufficient experience to conduct the death penalty review, nor did it have the necessary resources to support the reforms. This is why the recalling of the review power by the SPC is particularly meaningful and challenging.

The 'indirect effect' or 'signalling effect' of re-establishing the final review authority of the SPC carries equal, if not more weight. The reinstatement of review power by the SPC sends a clear signal to lower courts nationwide that they must exercise great care while reviewing and deliberating on the key facts and evidence of the cases before imposing the death sentences. This message sent from the SPC stands in stark contrast to the top-down signal during the 'Strike Hard' campaigns. If the previous message from leadership was to see more 'swift and severe justice' and a considerable number of executions, from around 2007 it became clear that the national-level authorities would like to see a decline in the number of executions and a more cautious use of capital punishment. Specifically, the lower courts are expected to take great care to exclude illegal evidence when deciding cases, correctly applying the criminal law, and use their discretion to sentence the offender to suspended death sentence or even lesser punishment if possible.

Indeed, one of the interviewees commented that one of the indirect consequences of the recall of the review power is that lower courts were becoming increasingly deferential to the opinions and instructions of the SPC. In fact, even before the reform, it had been a tradition within the Chinese criminal justice system that the SPC, solely or jointly with various legal organs at national level, issue guidelines,

opinions and reports to instruct the local courts at different levels on how to deal with a specific case or in general. The NPC granted the SPC such power to issue these so-called 'judicial interpretations' to lower courts in a resolution by the SCNPC in 1981 (The Standing Committee of the National People's Congress, 1981). These 'judicial interpretations' – although not as authoritative as penal statutes *per se* – are of legal force and are the most direct reflection of China's penal policy at the national level. All the opinions, instructions and guidelines issued by the top judiciary with regards to capital punishment reforms belong to this category of 'judicial interpretations'. In a country where the rule of law is yet to be fully substantiated, often penal policies are treated with more authority than penal statutes. Issuing judicial interpretations is a way through which vertical supervision within the judiciary can be implemented. Besides, as discussed earlier, individual judges at the lower levels have stronger incentives to limit the use of capital punishment as they can be deemed incompetent and lose the opportunity to raise salaries and gain bonuses if their cases are frequently overturned by the SPC.

In fact, the indirect effect of restoring the review power has much more of a profound impact than is generally believed. Apart from the influences of the SPC on lower courts, the reform transforms the penal regime in at least two other ways. Firstly, my interviews with prosecutors suggest that the repercussion effect of the reform has spread outside of China's court system to the procuratory and even to law enforcement organs such as the police. This is not difficult to understand: as the courts at trial and appellant levels are more inclined to exclude evidence obtained illegally or unfairly, the police and the procuratorates who provided such evidence are held responsible for the errors. This may be regarded as a 'domino effect'

generated by the court-centred reform process within China's penal apparatus responsible for the administration of capital punishment.

An HPC judge commented that:

'After the SPC took back its review power and announce its new capital punishment policies, we found that the procuratory and the police hold widely different legal standards while dealing with capital cases and capital defendants. In the first few years, almost 90% of the first-instance capital cases lack sufficient evidence to support the capital charges according to the newly issued SPC policy. Therefore we have to send back these to the procuratory and the police so that they can provide supplementary materials and evidence. We spend a lot of time investigating and securitizing the evidence in capital cases, and sending them back to investigating organs. It is the hope that, as time goes by, the police and the procuratory can further improve the way they deal with capital cases. Expectably, as less illegally obtained evidence are admitted into trial procedure, the police will refrain from using these illegal methods to exact evidence from the defendants. There are indications that things are already changing in that respect.'

Secondly, the reform in capital cases also had a 'spill over' impact on non-capital cases. Capital trials and sentencing are not completely divorced from the trial and sentencing of defendants to lesser forms of penal punishments. It was commonly believed by the interviewees that as due procedural safeguards are afforded to those

who commit the most serious crimes and who have caused serious damage to the society, defendants charged with non-capital crimes should not be denied these rights and safeguards. An interviewee from a provincial-level court commented, ‘my understanding that the recall of the death penalty review power is significant because it conveys a message to legal professionals and institutions in the field of criminal justice that that ignorance of the rules in practice are no longer tolerated. Many of the legal provisions that have recently been strengthened and reiterated existed previously, but it is the attempts to make them meaningful that counts. To a certain extent, the reinstatement of the review power by the SPC is as important as the introduction of the principle of legality (*nullum crimen sine lege*) into the 1997 Criminal Law’.

Examining the Practical Impact of other Reform Initiatives: Guarded Optimism

The majority (30 out of 36) of the respondents agreed that the removal of 13 capital offences from the criminal law, barring execution and conviction of those above the age of 75, and issuing new evidentiary rules would not result in a significant drop in the volume of executions or the number of people sentenced to death. Most respondents reported that according to their knowledge, the capital offences abolished by the Eighth Amendment in 2011 were already rarely used or never used before their abolition. This view was shared by foreign commentators. Amnesty International observed that the removal of capital offences was merely ‘legal housekeeping’ (Hogg, 2011). Only one respondent claimed that there had been a considerable number of people sentenced to death for those 13 capital offences

removed in the early 2000s. He said that at least in his province, there were a considerable number of prisoners sentenced to death for some of those abolished capital offences in the past, but not immediately before the abolition. He further suggested that these offences may still be widely used in some regions and that the government purposefully created the false impression that those offences were rarely used or never used in practice to ward off foreseeable public resistance to reforms. It remains difficult to verify his claim without sufficient data from other sources.

Regarding the introduction of the maximum age limit for capital offenders, none of the 36 respondents had ever sentenced, prosecuted, or knew their colleagues dealt with capital offenders beyond the age of 75. Some of them told me that they believed that the age ceiling should be lowered from 75 to 70 as it is very rare that people above the age of 70 are charged with capital offences. One of them disclosed that, according to a source of data he had access to, there were fewer than 10 prisoners above the age of 70 who were condemned in 2010 nationwide. Given the extremely small number of old people subject to capital punishment and the caveat in the language of the exemption clause – that people above the age of 75 will still be subject to capital punishment if they commit murder with exceptionally cruel methods⁸⁶ – it is safe to conclude that the Eighth Amendment clause exempting the aged from capital punishment did not and will not result in a substantial decline of the use of capital punishment.

⁸⁶ The Eighth Amendment to the Criminal Law of the People's Republic of China (2011), article 3.

This said, although most respondents welcomed the introduction of an upper age limit to those subject to capital punishment by and large, three of them believed that the elderly should not be excluded from the scope of capital punishment due to concerns that this change in law would encourage old people to commit capital offences, given the reality that a considerable amount of officials commit corruption crimes only when they were planning to retire from their offices. Some legal professionals were concerned that the public would be dissatisfied and angry for exempting aged corrupted officials from capital punishment. It seems that the opinions are widely divided among the legal professionals I interviewed. In general, the interviewee groups from the two provinces where the level of socio-economic development is relatively low held more conservative, anti-reform sentiments, whereas the groups from coastal regions showed greater openness and acceptance of the reform initiatives. This general observation, of course, needs to be tested more rigorously by future quantitative studies.

All the respondents welcomed the new evidentiary rules but were also uncertain about their practical significance. According to some of them, the new evidentiary rules are merely a repetition of penal statutes – there was nothing new introduced by the evidentiary rules. A respondent said that this reform initiative is just like filling 'old wine in a new bottle'. Some said they were reserved on the practical impact of such rules and that they would wait and see if these rules can really improve the practice. One respondent commented that the post-2007 reform measures, including the making of evidentiary rules, are mostly supporting mechanisms for the recall of the review power by the SPC. In other words, not much improvement has been made since then. Yet one respondent held different views about the significance of the

evidentiary rules: 'in practice, the provisions in Criminal Procedure Law, which already existed before the release of the evidentiary rules, were simply empty words because they could not be enforced. The new evidential rules, however, are proof that the reform-minded legal professionals are working hard to change the situation, so that the legal provisions themselves will have teeth'... 'the death penalty is so different from other penal sanctions and that is why we started from here to make things different; and the important changes in the field of capital punishment will have fundamental implications for other, non-capital areas in criminal justice.'

Conclusion

China's institutional adjustment of its capital punishment law and practices began to gain momentum in 2004, following the second Five-Year Reform Plan of the People's Courts (2004-2008) which prioritized reform in the field of capital punishment. Since then, the SPC regained the review power over capital cases from Provincial High Courts in 2007; appellant trials have been held in open courts instead of in secret from 2006; China's state legislature removed 13 capital offences from the Criminal Law in 2010 and the aged (above the age of 75) were no longer punishable by death save in exceptional circumstances; and lethal injection has generally replaced shooting as the main execution method. These reforms, which have institutionalized the transformation of the discourse on capital punishment since the turn of the century at a remarkable pace, are the outcome of sustained efforts by legal elites to contain the expansion of capital punishment in Chinese penal law which can be traced back to the late 1970s.

In contrast with other jurisdictions which abolished the use of the death penalty once and for all, it seems that the Chinese judiciary and legislature has agreed to adopt a gradual approach of reducing the use of capital punishment in law and practice. Judicial reforms were led by the SPC and followed a pattern of top-down reforms aiming to regulate and restrict, but not abandon the use of capital punishment. Legislative reforms started with the rarely used capital offences and are expected to move towards more frequently used capital offences in the future. The reform plans were also strategically selective: certain aspects of the Chinese capital punishment regime, for instance the grant of clemency and the disclosure of figures of death sentences and executions, have been intentionally left outside the reform plans. It seems that the Chinese authorities have chosen areas of capital punishment law and practices that are less likely to arouse public resistance and most likely to yield positive results. As one of the legislators who I interviewed said, the making of the capital punishment reform plans is a manifestation and a test of the wisdom of Chinese legal elites.

The practical significance of these reform measures should not be underestimated, yet the most significant initiative to date is the recall of review power by the SPC. Evidence from my interviews with legislators, judges and prosecutors suggests that the major decline in China's use of capital punishment depends primarily on the painstaking efforts made by China's judiciary to bring down the number of death sentences, rather than a concerted endeavour by all branches of the legal authorities. And even the genuine promoters of reforms hold pragmatic and reserved views regarding the purpose of the reforms. At least in the current stage, the reforms are not

deemed as a step toward eliminating the state power to punish its citizens with death; rather, the reforms are perceived to consolidate and improve the functions of Chinese capital punishment machinery.

However, this is not to underestimate the significance of the reforms. It is appropriate to have at least guarded optimism. After all, the recall of the review power over capital cases by the SPC has led to a drop in the number of executions and death sentences. Given the significant volume of the total numbers, the decline should not be underestimated. Moreover, as there were few people sentenced to death for the 13 abolished capital offences in recent years and few people above the age of 75 were sentenced to death, the Eighth Amendment will not result in a significant decline in the number of capital convictions or executions. However, the fact that the legislature has started to consider removing capital offences from the book may signal a good start of further removing non-violent crimes from the law in the future. Additionally, there were indications that there has been a rise in the execution and conviction figures in 2009-2010 after the initial fall. Finally, the impact of the evidentiary rules and the proposed sentencing guidelines are difficult to assess at the current stage.

Chapter Four. Domestic Political Dynamics Surrounding the Reform of Capital Punishment in China

Introduction

China's capital punishment reforms were triggered by both intense public discontent of the flawed capital punishment machinery and growing international pressure on China to restrain and regulate its use of capital punishment. This long awaited reform occurred in a transitional, fast-changing society. Rapid social transformations resulted in the emergence of conflicts and contradictions among different social groups out of a previously homogeneous society. China's penal system today saw a juxtaposition of opposite views, concepts, policies, forces, and mechanisms. In fact, as shown in Chapter Three, the Chinese capital punishment regime has swung between two contrasting approaches and trends since its inception. These competing forces have continued to shape contemporary reform processes.

It is against this background that we see the need for nuanced perspectives to explain *how* different political, social and institutional forces propelled or restrained the reforms of China's capital punishment regime. It is certainly appropriate to explain the use of capital punishment with reference to the political character of the party-state. The CCP and the Chinese government at various levels and during different historical periods have always been explicit about the fact the Chinese criminal justice regime serves political purposes (Trevaskes, 2010: 356). Indeed, Chapter

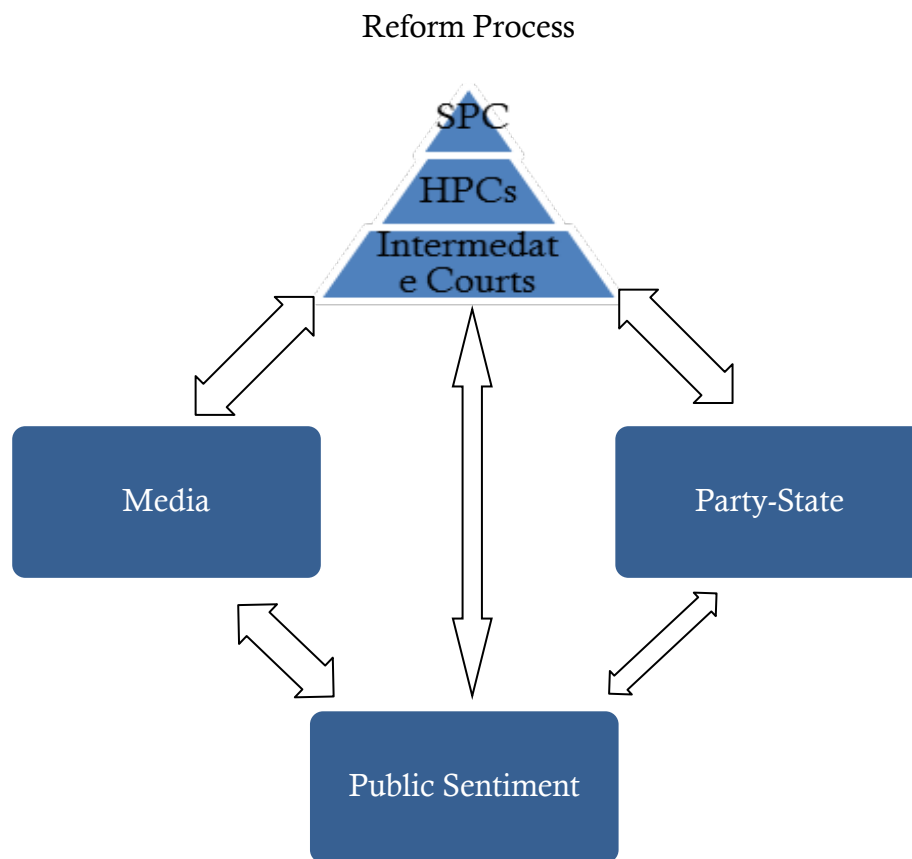
Three argued that capital punishment acts as an important vehicle of social governance. However, linking the excessiveness of capital punishment policies in Communist China to the political character of the PRC does not help to interpret, in greater detail, the causes and dynamics of recent reforms.

This chapter argues that the death penalty reform was born out of competing views between different social groups, conflicting interests between political and legal apparatus, and competing penal power within the criminal justice regime. Section One looks at the public impulses versus elite influences in the administration of capital punishment before analysing how the changing balance of power between the two allowed alteration of policies and law. Section Two examines the divergent interests and views between central-level and local-level penal authorities and explores how these differences shaped China's shifting policies on capital punishment. Section Three focuses on the tension between judicial autonomy political interference in the context of China's use of capital punishment.

I conclude at the end of this chapter that the recent reforms of capital punishment in China were not a mere historical contingency. Nor was it purely the realization of the personal ideals of a few reform-minded politicians at the constellations of power in Beijing. Rather, the reforms were born into and shaped by the interactions of a range of complicated social relations and institutions. They have been shaped by the contrasting positions held by different hierarchies of judicial institutions responsible for the administration of capital punishment in China, by the tension between the autonomy of judiciary and political interference, by the conflicts between reform-minded elites and vengeful populist impulses (see Figure 8). This is of course not to

deny the role of international influences discussed earlier in Chapter Five. Along with domestic factors, international pressure is also an important motivating force for China to change its capital punishment policies. The global socializing forces of the international anti-death penalty movements have gradually transformed the attitudes of academic elites and legal professionals in China.

Figure 8: Interrelated Domestic Institutions Involved in China's Capital Punishment



Section One. Between Populist Ethos and Elitism

A primary attribute of Chinese communist penal policies is the juxtaposition of a populist approach to criminal justice and law-abiding, minoritarian elitist attitudes. The populist approach endorses wide participation in penal decision-making processes by the mass and informal ways to solve disputes. An elitist mode, in contrast, refers to an approach relying on specialized, professional, and formal legal apparatus, which exemplifies rule-of-law features such as predictability, consistency, and stability, to administer capital punishment. This section finds that the use of capital punishment in contemporary China has been swinging between these two sets of opposite penal ideologies.

Popular Justice versus Elitism in Maoist China

Contrary to the assumption that authoritarian authorities are insensitive to popular demands for justice, the Chinese penal regime has been highly attentive and responsive to public sentiments since its early days. That courts, police and procuratorates in China all bear the name of 'people' in their titles speaks for itself and highlights the populist ethos surrounding the operation of penal justice. In existing criminological literature, the concept of 'popular justice' has been broadly defined to include a wide range of informal, non-professional and non-bureaucratic penal practices, rituals and decision-making processes initiated or sponsored by the state. It can refer to either mass-line practices in revolutionary socialist societies or grassroots populist forums in capitalist welfare states (Vogler, 2005: 197; Merry and Milner, 1993: 31-32).

Populist ideologies were reified by practices and rituals of mass trials and sentencing rallies (Griffin, 1976; Leng, 1967; Cohen, 1968) in the pre-1949 Communist Shan-Gan-Ning Border Region. The most notable example of the Maoist approach to justice in this era was the 'Ma Xiwu Mode of Adjudication'⁸⁷. Ma's approach entailed a whole set of mass-line techniques, including promoting the participation of lay judges (people's assessors) in trials, handling cases in circuit tribunals instead of courtrooms, and encouraging the active, direct involvement of local people in the entire judicial process (Ma, 1959; Palmer, 2007). In essence, the Ma Xiwu approach favoured an informal, non-bureaucratic approach to the administration of justice. It promoted capital trial as a vehicle for political propaganda and mass 'education'. In this context, popular justice became the prevailing mode of justice administration due to its political utility in mobilising public participation in, and support for, the ruling regime. In Ma's own words, popular justice was 'the Party's powerful and tamed instrument' (Ma, 1959: 39).

In fact, judicial cadres from within the communist penal regime who supported an elitist approach to justice were regularly disciplined for their lack of mass-line consciousness. Patricia Griffin reported that judicial workers were criticised and even arrested for devoting little effort to publicize the cases and 'educate' the masses, for sentencing different classes of offenders with similar standards, for 'taking a legalistic viewpoint that insisted on following judicial form rather than relying on mass

⁸⁷ Ma Xiwu was a Communist cadre who headed the Longdong Division of the High Court in the Shan-Gan-Ning Border Region from 1943 to 1946, and later the High Court in the Shan-Gan-Ning Border Region from 1946 to 1949. He promoted mass-line justice which later became the hallmark of the Chinese Communist justice system and had a profound influence on the later development of China's socialist legal system.

opinion', and for failing to punish counterrevolutionaries swiftly and severely (Griffin, 1976: 42-55). It seems that the political environment in communist border regions, at least during certain periods, was not receptive to elitist ideas of legal professionalism, the rule of law and judicial independency.

In contrast with the prevalence of popular-justice in communist border regions, the Republican (Kuomingtang) government pursued an extensive programme of prison reform (Dikötter, 2002), enhanced legal training for legal practitioners (Gellhorn, 1987: 4), and importation and compilation of the 'Six Codes' (Chen, 1973: 207-208; Epstein, 1994: 31-32). Stanley Lubman described the attempts by Chinese Nationalists to reform their legal system as 'formalistic, limited to the cities, and marked by corruption and ineptitude' (Lubman, 1983: 200). Indeed, one of the challenges for this wholesome legal transplantation was the difficulty for Western legal norms to take roots in the inhospitable soils of Chinese society (Tao, 1971: 749-751). While there was room for acceptance of the new rules and values among China's highly educated elites, the new legal system remained alien to the majority of China's populace who lived in the vast rural areas (LaKritz, 1997: 248-249; Epstein, 1994: 32). Thus, the legal reform by Republican government was fundamentally elitist.

Popular justice became further entrenched into penal practices after the founding of the PRC. The peak of executions in Mao's era – the Suppression of the Counter-revolutionaries (1950-1951) – was accompanied by an increasingly evident ethos of popular justice. A brief review of the news reports appearing on the *People's Daily* (the newspaper which remains the mouthpiece of the Party) between October 1950 and

July 1951, found over 25 reports documenting mass trials, sentencing rallies and public executions all across the country. Examples include a report that over 30,000 people attended an ‘accusation rally’ held at a sports stadium in Shenyang and approximately 1.1 million people listened to its live radio broadcast; that over 30,000 participated in an ‘accusation rally’ in Guangzhou, while over 70,000 people listened to its radio broadcast; and that over 10,000 people attended a similar sentencing rally in Shanghai, while 2.8 million listened to the radio broadcast (Reporter, 1951a; Reporter, 1951b).

The initial stage of the Campaign to Suppress Counter-revolutionaries rarely saw populist instruments such as sentencing rallies and capital sanctions. However, political propaganda promoting populist administration of justice intensified towards the late 1950s. At least four editorials in the *People’s Daily* during that time warned public security organs, courts and procuratorates at lower levels about the danger that the masses were ‘unsatisfied’ with the Party’s ‘excessively lenient’ penal policy towards counter-revolutionaries, without providing any statistical or factual support for its claim (Editorial, 1950a; Editorial, 1950c; Editorial, 1950b; Editorial, 1950d). Almost immediately, the State Council issued a directive explicitly instructing penal agencies that ‘all offenders [who] committed counter-revolutionary activities after the state-making must be punished’, as a response to these editorials. (The State Council of the Central People's Government, 1950). Top political leaders also voiced their support in the *People’s Daily* for this request for harsh penalties (Bo, 1950; Peng, 1951), which appeared alongside news reports advertising forthcoming political campaigns to combat ‘right-leaning conservatism’ within political as well as judicial circles.

The Campaign to Suppress Counter-revolutionaries was not the only instance of Maoist radical mass-line penal policy. During the decade-long Cultural Revolution (1966-1976) – often described as the ‘most dramatic application of mass-line since 1949’ – Mao and his followers encouraged, endorsed and tolerated fanatical crowd violence against their political opponents (Leng, 1967: 154-157), in the name of and with the aid of the people. Radical popular justice during the Cultural Revolution gave birth to an anarchical refusal of judicial apparatus: legal institutions including courts, procuratorates and the police were completely abandoned. Extrajudicial killings, rather than legal executions, were the primary causes of the deaths of millions of Chinese⁸⁸. As before, Maoist radical popular justice in this era involved a strong element of political manipulation. However, this observation is subject to an important qualification. As Tu (1996) and Strauss (2002: 95-98) have argued, without the willingness and passion of the masses to contribute their share of passion, murders and persecutions on such a scale would never have occurred.

The prevalence of popular justice in Maoist China, to a large extent, is the outcome of political demands by an authoritarian political power. Notwithstanding his occasional reminder in official discourse that capital punishment should be used with restraint (Mao, 1956: 299-300), Mao Zedong repeatedly proclaimed that ‘it was absolutely right to execute those counter-revolutionaries’ (Mao, 1956: 298; Mao, 1957: 397). Indeed, as a ‘fervent partisan for capital punishment’ (Zhang, 2008: 118), Mao viewed it simply as a political ‘tool of class repression’ (Mao, 1949).

⁸⁸ The official figure reported by Xinhua News Agency in 1980 stated that 34,800 people were persecuted to death. This figure announced by the state, however, seems to be fairly conservative when compared to the estimates and sociological analysis made by scholars, which range from around 1 million to as many as 20 million (Chiot, 1996; Yan and Gao, 1996: 529; Chang and Halliday, 2005: 569).

Popular justice practices and policies in Maoist era could generally be seen as the conscious choice of ruling politicians, employed in order to consolidate political power and maintain political as well as ideological control over society by inflicting state-sanctioned violence. The Chinese masses were encouraged to turn their hatred into demands for violence, revenge and blood; state-monitored media outlets provided the voices of these morally outraged masses with unprecedented direct airing. The Maoist popular justice strategy seemed to be successful in achieving these goals – harsh penal policies and populist ideologies appeared to secure overwhelming public trust in the Maoist regime (Glover, 1999: 292; Tu, 1996: 164).

This said, despite the dominance of populist impulses throughout Mao's era, elitism did not die out. In the 1950s, for instance, Soviet influences had a significant impact on China's mission seeking for legal regularity and modernity (Liu, 2002: 1047-1050; Lubman, 1983: 201-203). Although popular justice was no doubt the prevailing mode of penal influence, ideals of 'elite justice' emerged inside the communist leadership, largely because the administration of penal justice during the early years of the PRC had to rely on judicial professionals with legal qualifications and training attained under Kuomintang's 'Old Legal Tradition'⁸⁹. These juridical professionals, however, were periodically purged during various political campaigns because of their intellectual and political backgrounds (Epstein, 1994: 32; Reporter, 1957a).

The legal regularization in the 1950s was a golden age for these long-repressed and untrusted legal professionals. This short interval saw relatively moderate capital

⁸⁹ The nationalist legal system, in particular the Six Codes compiled under the Rule of Jiang Jieshi, was labelled as the 'Old Law Tradition' by Communists and their own laws were called the 'New Law' instead.

punishment policies, in stark contrast with the excessively arbitrary use of the death penalty policies during the Campaign to Suppress Counterrevolutionaries. From 1953 to 1957, Liu Shaoqi and his like-minded cadres made sporadic attempts to establish and implement Soviet-model legal norms and institutions. With a short-lived political current flowing towards political liberalization, Liu and his comrades, who favoured regularized, formal legal systems over mass-line, campaign-style justice seized the opportunity to build legal institutions, adopt new laws, and enhance legal education and training for cadres. They held a conditional abolitionist view on capital punishment, believing that 'capital punishment should be regarded as a transitional and *ad hoc* punishment' and that 'the scope of capital offences should be restricted to the minimum...to achieve final abolition.'⁹⁰ In 1965, the Central Committee of the CCP proposed 'gradually abolishing all capital offences' in its report to the Eighth National Congress⁹¹.

The tension between mass-line and elite-line at the top essentially revealed a deep divide in ideologies of political governance. From the very beginning, this short-lived legal institutionalization in the 1950s met with deep ambivalence and considerable resistance within political and judicial circles (Lubman, 1999: 74-79). With Mao winning almost absolute political control over the nation in the mid-1960s, this elite-

⁹⁰ Liu and Mao represented two lines since the beginning when both of them joined the CCP in 1921, which produced many contradictions in specific policies, see (Snow, 1971: 17-19). For abolitionist views in the 1950s, see (Li, 1957a).

⁹¹ Liu Shaoqi supports formalized legal apparatus and codified legal system required by the rule of law. He stated prisoners should not be sentenced to death unless they committed the most heinous crimes that aroused public anger. He believed that defendants should receive humanitarian treatment when serving their term; all capital cases should be reviewed or decided by the SPC, see (Liu, 1956). His view on capital punishment stands in stark contrast with those of Mao Zedong, the latter himself was a believer in popular justice and rule of man. See (Mao, 1956: 41) and (Mao, 1957: 37-38). Unfortunately, the penal philosophy of the latter dominated the criminal justice circles in the first thirty years of the PRC.

line effort to regulate and moderate China's use of capital punishment, contradicting Mao's distrust and disapproval of formalized legal bureaucracies, was eventually frustrated. Extensive use of capital punishment without any kind of legal constraints was established during the Maoist Culture Revolution in the following decade with Liu's defeat.⁹²

Popular Justice versus Elitism in Deng-Jiang Era

In post-Mao China, the need to engage the masses in populist penal justice found a new form in punitive 'Strike Hard (*yanda*) Campaigns' (Tanner, 1999; Trevaskes, 2007a: 81-144), which were accompanied by cyclical spikes in the use of state-sanctioned executions. Mass-line Strike Hard Campaigns were justified by the need to vitalize the protection of the people from lawlessness. In fact, Deng Xiaoping and others from the top politico-legal leadership determined to launch Strike Hard Campaigns largely because they believed that 'rapid rises in crime [made us] lose the support of the people' (Liu, 1992: 4). Two months into the 1983 campaign, he concluded that '[the campaign] won warm support of the masses... The masses are only concerned that [the offenders] are punished too leniently' (Liu, 1992: 5-7). It

⁹² That said, the author does not intend to make an argument based on historical contingency that if the political leaders with an elite-line view in justice prevailed in political struggles, the lives of many Chinese may be saved. Deng Xiaoping, whose preferences on formal rules and procedures as mechanisms of governance closely resemble those of Liu Shaoqi, launched the Strike Hard Campaigns in the 1980s, after the publications of the first Criminal Law and Criminal Procedure Law in the People's Republic. Peng Zhen, a prominent political figure whose policies may reflect the policy preferences of his political patrons Liu Shaoqi because of their close personal as well as political ties, emphasized the centrality of the CCP leadership and that human rights concerns should not obstruct the campaign to eliminate traitors in the 1940s. He also supported ruthless suppression of counter-revolutionaries during the early 1950s. As long as the political-legal linkage is strong and the penal justice considered a political instrument, properly institutionalized and formalized penal systems can be circumvented and the development of popular justice will be pushed along the political lines when the political environment is unfavourable of leniency (Potter, 2004: 15, 43 and 115).

seems that, although the targets of capital punishment changed from political offenders to ordinary criminals, its populist characteristics remained unaltered.

While recourse to the ultimate penalty had peaked in the early 1950s during the Campaign to Suppress Counterrevolutionaries, the second significant peak in Chinese use of capital punishment was caused by the first round of Strike Hard campaigns from 1983 to 1987. This again involved public trials and large-scale sentencing rallies (Palmer, 1996: 117; Davis, 1987: 330; Tanner, 1999: 136-137; Boxer, 1999: 606-607) held in factories, street communities, schools, and rural areas (Chen, 1998: 42).

Photographs of prisoners on trial, being paraded through the streets, and even being executed, were commonly displayed in school yards in urban and rural areas during the 1983 Campaign in order to 'educate' young people (Tao, 2010). On some occasions, 'public indignation' (*min fen*) replaced legal rules to become a licence to sentence someone to death. 'Executing [prisoners] to assuage the people's anger' (*bu sha bu zu yi ping min fen*) served as the most popular and justifiable logic for sanctioning executions (Wang, 2004: 179). The objectives of 'propagandising the masses, mobilising the masses and bolstering the masses up to expose criminal conducts to the public security organs', as expressed by China's then Premier Li Peng, were downright political: to 'boost the confidence of the masses in the Party and strengthen their flesh-and-blood connection with the Party' (Fu, 2001).

Interestingly, these periodical outbursts of populist impulses in the post-Mao era alternated with tendencies of legal professionalization and specialization (Epstein, 1994: 27). Stephen Davis has commented on this uneasy juxtaposition of both

tendencies. He has observed that a two-pronged policy was evident in the criminal justice system in the late 1980s: the leadership advocates legal reform to enhance procedural fairness and due process protection, at the same time the authorities vigorously endorse the use of capital punishment and other serious penalties (Davis, 1987: 329). The expression of punitive impulse in criminal justice policies and practice is closely related to the underlining ethos of penal populism. Thus, this legal reform *versus* reliance on harsh punishment arguably was a reflection of the populism-elitism tension discussed in this chapter.

China's search for legal modernization since the late 1970s led to 'the most concerted effort in world history to spawn a legal profession'(Alford, 2003: 193) which has resulted in some positive changes. In contrast to the preference for the Soviet model in the 1950s by legal reformers, China's legal authorities under the leadership of Deng Xiaoping and Jiang Zemin borrowed from the laws, legal institutions and values in 'the West', that is, Europe, the United States, and countries such as Japan and beyond (Lubman, 1999: 122-123). Legal transplantation from overseas jurisdictions 'affected virtually all aspects of the Chinese domestic law reforms' (Epstein, 1994: 19). Fruits of the reform process toward legal professionalism included the rapid growth in the number of law students, judges and lawyers, the extensive expansion and development of legal institutions, and the significant enhancement of legal professional training for legal personnel (Lubman, 1999: 151-159 and 253-254; Alford, 2003: 7; He, 2005: 145; Cooper, 1999: 79-80; Liebman, 2007: 624-625; Chen, 2012; Peerenboom, 2011).

This reform process produced ‘an emerging class of legal professionals participating’ in newly established legal apparatus as Western legal approaches were assumed to be a better way to resolve complex social disputes arising from a society in transition than traditional mass-line techniques of dispute resolution (Epstein, 1994: 34). The quick rise of this new legal elites group – academics, lawyers, judges and other legal professionals – was a response to the widespread needs for legal consistency, regularity and certainty during an era of economic reform. The newly-emerged profession seems to have gained higher social status and more lucrative financial rewards than pre-reform eras (Szto, 2004: 586). Therefore, the administration of capital punishment in the Deng-Jiang era was shaped by both a populist, punitive Strike Hard mode of justice and a growing influence of elitism. In general, it was the former outweighed the latter in penal practice and policy.

Popular Justice versus Elitism under the Hu-Wen Administration

China under the leadership of Hu Jintao and Wen Jiabao saw maintaining social and political stability as the official political ideology. The ‘harmonious society’ rhetoric (Holbig, 2006) – the defining feature of Hu and Wen’s policy discourse – underlined the state authorities’ overriding concerns that social conflicts could easily spiral out of control in an increasingly unstable society. As Huang (2012: 729-730) argued, the growing popular resentment against widespread corruption and mass protests across the country pointed to ‘a government legitimacy crisis’. The weakening of state control over some segments of social life and the growth of civil society led to reconfigurations of political and penal power. The ‘harmonious society’

rhetoric triggered a shift in penal power towards restrained, softer, less-repressive approaches. Old crime control techniques were seen as out-dated and counter-productive in a 'harmonious' society. As one of the interviewees observed, that the 'new generation' of politico-legal professionals in China today have 'less faith in harsh penal sanctions as effective crime-combating tools' while the older generations of politico-legal elites have gradually realized that recourse to the death penalty has not shown significant chilling effect on the rising incidence of crime. After the turn of the millennium, periodic campaign-style crackdowns gradually lost their appeal. A subtle shift in 'the political culture of punishment' towards a limited degree of penal moderation thus took place (Trevaskes, 2010: 356).

On the one hand, as Gunther Teubner stated, transplanted legal institutions and concepts, rather than passively adapt to the static recipient soils, create evolutionary dynamics of 'mutual irritation', processes that will finally lead to reconfiguration of both the transplanted target and the recipient (Teubner, 1998). This theory applies well to the Chinese context of modern legal reform. Western-rooted norms and views in the field of criminal justice imported into China since the late 1970s acquired a life of its own and helped to promote changes to China's existing penal institutional and legal environment. In particular, this 'irritating' force helped to push China into the path of restrained use of capital punishment. New elite force, with their Western-originated professional training and legal education, injected concepts such as the rule of law, due process, judicial independence and human rights into the Chinese penal regime in the Hu-Wen era. The most visible signs of penal moderation in this era were a series of capital punishment reform initiatives, with the most significant

being the recall of the review power in capital cases by the SPC in January 2007 (Johnson and Zimring, 2009: 270-282).

Meanwhile, despite the decline of Strike Hard Campaigns, populist ethos continued to play a role in shaping Chinese penal policies in new forms. With the party-state's promotion of legal reforms and its encouragement of citizens to use law to solve social disputes, populist sentiments started to reflect the raising rights consciousness for the ordinary people. There is a weaker element of political propaganda and manipulation in the new populist impulses. Besides, the meanings of populist sentiments have gradually changed: it no longer demands harsh punishments one-dimensionally. In fact, the reforms aimed at regulating and moderating the use of state-sanctioned killings was, to a certain extent, a political response to widespread public dissatisfaction with the dysfunctional, error-prone penal machinery (Trevaskes, 2010: 355). As stated in earlier chapters, the highlighted media reports of several cases involving miscarriages of justice in the late 1999s and early 2000s (Scott, 2010: 72-73; Chen, 2005a: 525), helped to redirect public attention from dissatisfaction with the rising crime rates to concerns about the plight of capital offenders and criticisms of the flaws of capital punishment machinery. These changes created perceptible momentum for the state authorities to engineer reconfigurations of the capital punishment regime.

Therefore, capital punishment reforms arose from the growing influences of legal professionalism, the rising awareness that mass-line Strike Hard Campaigns were not a sufficient crime deterrent, and a rising consciousness of being in the power to uphold the rights of citizens and control administrative arbitrariness. Changes to the

power balance of and the shifts in the meanings of populism and elitism by the mid-2000s made it possible for human rights as well as European abolitionist influences to extend their reach into the realm of capital punishment law-making and administration.

Importantly, further popularisation of the internet as a new mass communication technology in this current era has contributed to these transformations of penal ideologies and techniques. Although subject to state censorship (Xiao, 2011: 49-52), cyberspace has provided a forum where authentic public opinion can have an outlet that is impossible via the dogma of traditional media, particularly on politically sensitive or controversial matters (Yang, 2009; Goldman, 2005: 186-200) such as capital trials. Media run by the party-state no longer has a monopoly over public discourse on criminal justice: previously taboo topics on penal matters are now subject to rigorous public and political debate. In fact, procedures and processes surrounding the use of capital punishment – in particular the adjudication of individual capital cases and the legislative acts of amending the scope of capital offence in criminal law – have become the focus of popular discourse on penal affairs (Hood, 2009).

Indeed, flexible and responsive penal policies adopted by the Hu-Wen administration exposed capital punishment policy-making and even the trial of individual cases to populist influences. From the Maoist mass-line tribunals to the Deng-Jiang Strike Hard Campaigns, politicians at the top actively constructed the ‘public will’ in the name of the masses according to political expediencies and interests. Through top-down propaganda carried out by the state-run media, the masses were made to believe that the state-made ‘public will’ was a genuine expression of their needs and

desires. 'Popular justice' arrangements turned out to be an instrument to implement already-established penal policies. In contrast with this state-initiated exercise of arbitrary and excessive penal power, the ruling party-state gradually lost its monopoly over discourse and policies on capital punishment and had to share its authority with the public at large with the changing state-society relationship in Hu-Wen era.

It has become common that political and legal institutions seek public support by aligning the outcomes of their decisions with the perceptions of what is believed to be the prevailing public sentiments and expectations at the grassroots level. These public aspirations, in contrast to the 'public will' created by the state in the old mode of popular justice, were unlikely to be exclusively the product of political manipulation as they are normally acts of grievance-seeking or protests against the ruling regime, collective or individual. This current form of penal populism, which reflects a reconfiguration of the power to punish, is fundamentally different from the scenario of state-planned 'popular justice'. To a certain extent, it reflects the pressures from below.

As discussed in earlier chapters, the proximate cause of the launch of capital punishment reform in 2007 was widespread public discontent against the flawed capital punishment regime. Ironically, the process of top-down, elite-led readjustment of capital punishment law and policies, after initially gaining popular support, met with substantial public resistance as it developed into a broader reform commitment. In 2010, the draft Eighth Amendment to the Criminal Law, which proposed the removal of 13 economy-related, non-violent offences from the scope of capital offences and the exclusion of the elderly (those above the age of 75), was met

with widespread public criticism, despite the fact that the elderly had rarely been subject to executions under judicial practice. The state authorities immediately responded to and conditionally accommodated the storm of public opinion.

Consequently, the final wording of Article 3 of the Eighth Amendment, which was passed in early 2011, introduced a clause stating that people above the age of 75 are in principle not death-eligible, but are nevertheless subject to immediate execution if convicted of 'committing murder with exceptionally cruel methods' (The National People's Congress, 2011).

The outcome of capital punishment law-making process, therefore, reflects the compromises between elitist views promoting restrained use of capital punishment and prevailing conservative populist opinions. This illustrates that as no precise statistics for capital executions and sentencing are publicly available in China, public debate regarding capital punishment has often been out of touch with reality. In this case, the public were unaware that the elderly were rarely subject to the death penalty even before the proposal was drafted. However, the fact that the authorities, fully aware of this, pushed reformers to make compromise in alignment with conservative public opinion once again confirmed the populist power over penal affairs within an authoritarian socialist polity. Despite the growing elitist influences, politicians still have little will or capacity to resist popular pressure. The prevailing collective sentiment, even if based on false information, is still highly influential in shaping penal, and ultimately political, decision-making.

Equally significant was the debate surrounding the removal of corruption offences from capital punishment. Crimes involving corruption and bribery were not, in fact, on the proposed abolition list of the draft Eighth Amendment, but rumours were

spread through misleading news reports based on leaked minutes of a closed session of the LACSCNPC. With false information circulating that the state legislature planned to remove corruption and the taking of bribes from the list of capital offences, heated public criticism was sparked across the country, with people complaining that corrupt officials would be freed from the fetters of penal sanctions (Mu, 2010). As usual, the state authorities quickly complied with public sentiment. A member of the LACSCNPC assured the public, mostly internet users, during an 'online press conference' that abolishing capital punishment for bribery and corruption had *never* been considered by the reformers and that the authorities would continue to 'harshly punish' those who committed such crimes. The state-run *Xinhua Daily Telegraph* confirmed his speech as being 'the most authoritative' voice of Chinese state legislature (Wu, 2010).

Greater resonance between the authorities and the public, or those who claim to speak on behalf of the public, can also be observed in the adjudication of individual, high-profile capital cases in recent years. It has become increasingly common for China's courts to deliver justice to satisfy the demands of litigants and to respond to public sentiments (Liebman, 2011b), particularly given that the Chinese judicial authorities have insufficient judicial autonomy or authority to resist external pressures from either the party-state or the general public. The first example to be discussed here involves a 21-year-old defendant named Yao Jiabin (Watts, 2011).

Yao knocked a peasant woman off her bicycle and later stabbed her to death because of her potentially endless demands for compensation. His case caused public outrage, following inaccurate statements by the victim's counsel that Yao's father was a powerful, high-ranking official serving in the CCP's military, causing the media to

portray him as a 'rich second generation'.⁹³ Based on these rumours concerning Yao's family background, the unwitting public vented their outrage against corruption and inequality onto this defendant, declaring that 'this is a war between the grass-root masses and the elites, let's drown them with our voices!' (Niu, 2011).

Yao was seen as a 'common enemy' of the ordinary people who had suffered from injustice and inequality in an increasingly polarised society. These emotions united the public in outrage against a representative of the much-hated dignitaries, culminating in a collective populist demand that the defendant must be executed. Internet users expressed their outrage with a 'carnavalesque' (Herold and Marolt, 2011) outburst of passion, as if, with the defendant's execution, the anxiety, tension and grievance of their everyday lives could be released. The power of public sentiments was once again demonstrated, and the judicial decision-makers, even while knowing perfectly well that the media had misrepresented the facts of this case, were unable and unwilling to resist the pressure of the populist demand.

A second case involved a murder defendant, Li Changkui, who raped an 18-year-old girl and killed her and her three-year-old brother. The case attracted nationwide media and public attention due to an appeal decision. After the first court sentenced Li to immediate execution, a judge in the Yunnan provincial court amended this to a suspended death sentence on the grounds that Li voluntarily surrendered himself to the authorities (Qiu, 2011), which is a discretionary mitigating circumstance under the 1997 Criminal Law (article 67). The outraged family of the victims posted the facts of the case, together with the appeal decision, on one of China's largest social

⁹³ This term is applied to young people in China whose parents use power and privilege to help them escape punishment in spite of wrongdoing. (Watts, 2011)

media platforms, *Tencent Weibo*, arousing much sympathy and support for their cause. Public indignation swelled and in approximately two months, 270,000 messages regarding Li's case appeared on *Tencent Weibo* and 98% of the 23,000 participants in an online survey believed Li should be executed. The case was retried by the same provincial court and, under this considerable public pressure – despite the fact that the previous sentencing decision was not erroneous according to law – Li was finally sentenced to immediate execution in August 2011 (Qiu, 2011).

Rather than being tried by legally established courts, Li was in fact sentenced to death by a 'court of public opinion', based on the shared morality of internet users. The institutional and conceptual barrier protecting judicial elites from public scrutiny and criticism, commonly seen in Western liberal democracies (Pratt, 2007: 13-15), has never fully existed in China. The thin layer of insulation between the Chinese judiciary and the rest of society makes it difficult, if not impossible, for the former to resist political or public pressure. Consequently, individuals or interest groups in China are able to compel the judiciary to tilt towards their preferences by exerting pressure on the 'fragile' Party-state which views 'maintenance of stability' as the top priority (Xie and Shan, 2011).

This case shows the triumph of vengeful populist impulses. Indeed, failing to reduce the defendant's death sentence to a lesser punishment, both the career and personal safety of the provincial court judge were put in danger by raged internet users. This case is also a perfect illustration of the setback of elitist influences in decision-making processes in capital trials in Hu-Wen era. With the aforementioned Ma Xiwu Mode

of Adjudication making a rhetorical comeback nationwide⁹⁴ after Wang Shengjun took over the leadership of the SPC from Xiao Yang (Liebman, 2011a), seeking public and media attention has proven to be a short-cut to success (Liebman, 2005): when controversial capital verdicts appear to arouse public indignation and threaten social ‘stability and harmony’, the party-state will press the judiciary to bend with the winds of public opinion. Internet-based platforms – BBS forums, social media, blogs, and chat rooms – provide ordinary people, who previously had limited access to political-legal affairs, with convenient yet powerful tools to exert pressure for revenge and justice. This is why, in the capital cases cited above, the victims’ families turned to powerful channels of influence such as mass media platforms, rather than seeking judicial remedies.

This pattern of unprincipled accommodation of public demands by the political, judicial, and legislative authorities may have already reinforced a populist thirst for retribution and resistance to reform. By May 2011, a mere reiteration of the previous ‘kill fewer, kill cautiously’ reform policy in the 2010 annual work report of the SPC met with strong public disagreement (Mao, 2011). During Xiao Yang’s presidency of the SPC (1998-2008), a consensus was established that leniency should be chosen when judges face the choice between sentencing capital defendants to immediate executions or lesser punishments; this now seems to have collapsed. Increasingly responsive and submissive to public opinion, capital punishment laws, practices and bureaucracies are infused with *bottom-up* popular ethos.

⁹⁴ For instance, judges in the Henan Provincial Court took off their robes and laid down their gavels and travelled into the countryside to solve local disputes, whilst lay judges were given the opportunity to be directly involved in trials. The President of the Henan Provincial Court, Zhang Liyong, believed that by bringing in case verdicts that were in tune with the aspirations of the masses, the judges could prevent litigants from petitioning (*shang fang*) higher authorities and disturbing social stability, as well as dispel public distrust of the judiciary. See (Shen, 2012)

I have demonstrated above that in an authoritarian regime like the PRC, the penal and political authorities are sensitive and responsive to public sentiments, in spite of the fact that there are various degrees of control as well as manipulation orchestrated by the central party-state during different eras of Chinese penal history. Interestingly, existing literature has documented a similar – although not necessarily identical – tension within the criminal justice system in United States. Along with the rhetoric on states' rights, law and order issues, and a vigorous defence of traditional southern values, heightened penal populism found a deep expression in the post-Furman political backlash against abolitionism (Garland, 2010: 235).

A shared sensitivity of legal and political authorities to populist impulses in the United States and China, despite of the apparent divergent root causes for such a similarity and the fundamentally different characteristics of criminal justice and political systems of the two countries, invites us to reflect upon the causes for the retention of the death penalty in general. To what extent is the political orientation of state governments useful for the explanation of retention? Is the degree of sensitivity and responsiveness of penal as well as political organs one potential variable to explain the use of capital punishment in some countries where the death penalty connotes a political and cultural symbolism?

Section Two. Between the Central-Level and Lower-level Penal Authorities

A second set of uneasy relationships surrounding Chinese capital punishment policies regards the tension between the legal authorities at the national-level and lower levels. This central *versus* local tension is not completely divorced from the

above discussions about the dichotomy of populism and elitism, as popular justice necessarily requires a certain degree of decentralization in the administration of criminal justice (Brady, 1982). I will argue in this section that the locus and allocation of penal power within the capital punishment apparatus have considerable impact on capital punishment policies.

The Decentralization of Penal Power from Mao to Deng

In Chapter Three, I have explained that the communist use of capital punishment before the founding of the PRC oscillated between two extremes of excessiveness and relative restriction, in response to the political demand of the CCP and the external military environment in which the Communist regime sought to survive and defeat its enemies. A review of capital punishment policies and institutions suggests that an increase in the use of capital punishment in Communist border regions was normally accompanied by a decentralization of penal decision-making power.

For instance, during the early 1930s when there was increasing military threat from the Nationalists, the Jiangxi communist regime adopted expeditious procedures in capital cases to achieve short-run objectives of deterring and cracking down on political enemies as hastily as possible. The previous legal requirement for approval of death sentences by higher authorities before executions in all capital cases were suspended. Capital cases would be revealed only if the defendant appealed but even their rights to appeals were substantially limited. In most cases, reporting to higher authorities after the executions, not prior to executions, were required. The authority

to arrest, try, sentence and execute capital offenders, mostly counter-revolutionaries, were decentralized to the county level during heated class struggles. (Griffin, 1976: 48-49) The Jiangxi era witnessed the most excessive use capital punishment in the penal history of communist border regions.

Patterns showing links between decentralization of penal power to lower local political and legal authorities and more aggressive capital punishment policies can also be found in the post-1949 PRC. In Maoist China, political power at the top was highly concentrated in the hands of a small group of political leaders, including Mao himself, while lower bureaucracies were relatively weak. This was because Mao abandoned functional bureaucracy building in favour of implementing his policies through cadres and mass campaigns (Bergère, 1997: 267-277; 272). At different occasions, he de-emphasized the importance of legal institutions and norms in governing the country. In the context of criminal justice administration, the central leadership had no choice but to entrust the broad life-or-death power into grass-root mass organizations and even to the hand of a few cadres at the local level during political campaigns. The lack of strong, stable and regular legal institutions at lower levels – both at the provincial level and the grassroots levels – on which the political leadership can rely to implement policies, could easily lead to policy making at the top out of touch with the social realities and deviation in the process of policy implementation at lower levels.

Decentralization of the life-or-death power into fragmented, self-interested local bureaucracies could easily result in excessiveness and arbitrariness in the use of capital punishment as there was little institutional supervision or restraint that can

keep the use of penal power at the lower levels within the bounds set by law. The review power in capital cases was granted to provincial or even county level judiciaries or governments whenever political campaigns were launched to facilitate the crackdown on the targeted groups of these political campaigns.

The first President of the SPC, Shen Junru, explained in his first report to the NPC in 1950 that, in order to rapidly and timely suppress counter-revolutionary activities, the power for the review of death sentences was granted by the central-level authorities to branches of the SPC in major Administrative Regions or all provincial-level People's Government during the Land Reforms (1950-1952) (Shen, 1950). Similar resort to expeditious procedures in capital cases occurred during the Campaign to Suppress Counter-revolutionaries (1951-1953), which was one of the bloodiest chapters in China's penal history. Central legal authorities once issued a notice in September 1950 to bar counter-revolutionary capital defendants from appealing to higher judicial authorities. Even the 1954 Organization Law of the People's Courts, promulgated after the conclusion of Land Reform and Campaign to Suppress Counter-revolutionaries, provided that provincial courts were allowed to retain the power to review capital cases.⁹⁵

In terms of practical importance, decentralization of penal power is required when the central-level legal authorities have inadequate capacity to deal with sudden increases in capital caseloads with the Chinese penal regime's periodic moves towards harshness. Extending penal power downwards to lower legal authorities and

⁹⁵ During the lawless era of Cultural Revolution, judicial institutions were disassembled and judicial staff was removed from their positions. Consequently, reviewing capital cases were unnecessary.

relaxing due process safeguards in capital cases were therefore thought to be a temporary evil to compensate for the weakness of institutional capacity within Chinese penal regime. The turbulent years in the 1930s and the peak of political campaigns in the early 1950s both saw the inadequacy of central legal authorities overwhelmed by spates of counter-revolutionary capital cases waiting for approval and review and subsequent delegation of penal power. Meanwhile, decentralization of penal power to lower political and legal organs reinforced the local authorities' punitive appetite (Trevaskes, 2007a: 129) by granting them unrestrained power while dealing with capital cases. This in turn helps to explain the sharp rise in the volume of capital sentences and executions.

Post-Mao socio-economic reforms added significant complexity to the 'principle-agent' relationship⁹⁶ between the central and local authorities in Mao's era. Although the ultimate authority still resides within the power centre of the party-state at the national level, gradual expansion and strengthening of the functions and authority of local-level organizations accompanies economic reforms (Schram, 1985). A withdrawal of the central government from direct involvement in lower-level economic management and political governance, albeit to a limited degree, resulted in larger autonomy at grassroots levels.

⁹⁶ With roots to Lenin's idea of 'democratic centralism', the Maoist government structure featured a tight centralised control with little room for self-governance at the lower levels. On the one hand, the Central Government and the CCP exercises tight control over the lower governments. According to Article 7 of the Organic Law of the Central People's Government of the People's Republic of China (1949), the Centre Government had the power to appoint or to remove chief administrative personal and annul or revise regulations, decisions, and orders of organizations at lower levels. It maintained control over judicial matters through the Ministry of Public Security and People's Procuracy. See (Gluckstein, 1957: 363-364)

The unprecedented scale, speed and intensity of the first wave of the 1983 Strike Hard Campaign and thus the high volume of capital sentences meted out by nationwide judicial authorities demanded a larger capacity of the central judiciary to supervise capital trials and executions. However, due to the demolition of legal systems during the Cultural Revolution, the central judiciary was incompetent as it was not designed for accommodating such a huge demand. On the other hand, lower level authorities were equipped with growing power and resources to cope with the challenges as the power to review capital cases was vested in lower courts for most of Maoist era. Although the 1979 Criminal Law and Criminal Practice Law both prescribed that the review power belongs to the SPC, practical difficulties resulted in a failed attempt to depart from the old practices. By issuing a series of penal ordinances and directives, the SPC gradually legitimized and institutionalized this decentralization of review power (Tanner, 1999: 139-140; Trevaskes, 2007b).

Extreme examples of the swift and arbitrary justice under decentralized penal authority can be found in 1981 in Nanjing and in 1983 in Luoding, where within the space of eight days, a murder case and a rape case were respectively investigated, the defendants arrested and taken into custody, prosecuted, tried, had their appeals filed and rejected, and executed (Tanner, 1999: 76; Trevaskes, 2007a: 129). In 1983, Tianjin High People's Court invited the People's Political Consultative Conference (*zheng xie*) and the masses to 'review' the capital convictions made by the court, instead of legal organizations with law entrusted authority and personnel with legal expertise (Trevaskes, 2007a: 127).

The common assumption of the penal processes in an authoritarian state would suggest that political leaders at the top have the power to effectuate unified and full compliance of its political and legal policies by all sectors of society. Even under Maoist totalitarian rule, this model of social control was not entirely true. The shifting in the power structure among different levels of penal authorities in post-Mao China further challenges this paradigm. In general, provincial level judicial authorities, situated between the central authorities and the local community, supplied Beijing with an upward flow of information regarding capital trials and executions from the lower judicial authorities and transferred a downward flow of guidelines, instructions and regulations from the SPC. In theory, this vertical bi-directional process of reporting and supervision⁹⁷ constituted a check on the administration of justice at local level.

From the early 1980s, the national-level authorities' role of supervision was undercut by the arrangements of decentralized review power. This greatly increased the likelihood that the procedures of capital trials, sentencing and review were perverted by the service of local bureaucratic interests. Indeed, two decades of the decentralization bred corruption, resulted in disparate sentencing across different regions, caused prevalence of wrongful convictions, and contributed to the upsurge in the volume of death sentences and executions. Yunan Higher People's Court, for instance, acknowledged that the decentralization of penal power and the relaxation of judicial procedures in the era of Strike Hard Campaigns were not designed to safeguard errors and irregularities but to facilitate swift and heavy punishments

⁹⁷ According to Article 30 of the Organic Law of the People's Court, the SPC has the supervisory authority to oversee all lower courts across China.

(Trevaskes, 2007a: 149). In response to these problems associated with the decentralization of penal power, the SPC recalled its review power from provincial courts in 2007, which allegedly immediately resulted in a sharp decrease in death sentences and executions.

The Re-centralization of Penal Power during Capital Punishment Reforms

The restoration of the review power over capital cases to China's highest judiciary in 2007 marked a shift of penal power upwards the criminal justice apparatus. Conflicts of interests and ideas among different levels of judicial authorities immediately surfaced after the review power was reinstated by the SPC. My interview findings show that the SPC and provincial courts blame each other for the difficulties they have met while pushing forward the reform. SPC judges were greatly frustrated by the 'huge' resistance from the local-level judiciary – including provincial-level, intermediate-level, and grassroots-level authorities – to their instructions, legal interpretations, and directives on further limiting the use of capital punishment. This was particularly so before the recall of review power by the SPC in 2007.

One of my interviewees explains the difference before and after the recall of the review power in capital cases: 'Previously, the decisions of capital cases heard by lower courts, including provincial-level high courts, sometimes were only one-page long. Normally judges did not take the admissibility of evidence or legal provisions seriously. It was extremely difficult for us to do further, detailed investigation because of the resistance from the policy, lower courts and families of the victims'.

To them, local courts, especially courts in the socio-economically underdeveloped inland provinces, have a conservative and backward understanding of the reform policies and faced more obstacles to implement reform measures because of the intervention of local governments, petitioners and other anti-reform interest groups.

While central-level authorities are the most important loci of decision-making power regarding capital punishment policies and law, lower level judicial organs sometimes enjoyed wide discretion while implementing these policies and laws, and frequently stretched the power vested in them to the limit. As discussed in an earlier subsection of this chapter, this is particularly true with the shifting power balance between central-level and lower-level courts after China launched its economic marketization reform since the late 1970s. An interviewee reported that as early as 2006 lower level courts and governments nationwide opposed the reform initiative that capital trials would be openly held in second instance courts. Other interviewees recalled a considerable number of lower level legal practitioners objecting to the recall of review power in capital cases by the SPC in 2007.

On the other hand, local judges, mostly those at the provincial level, complained that legislators, scholars, and judges 'at the top' had no idea how penal system functions day-to-day at the grassroots levels. They believed that the elites at the higher hierarchy - out of touch with the realities - promoted Western-influenced policies that were simply unpragmatic in the context of Chinese society. Indeed, China's capital punishment reform programme were designed by elites at the top echelons of the party-state, rather than motivated by a fundamental change of attitudes among either legal elites from all levels, or the general populace. It has been mentioned earlier that

the recent changes to policy and institutions regarding capital punishment in China has been an elite-driven reform promoted and implemented in a top-down fashion.

Apart from the formulation of capital punishment reform plans, attitudes towards the implementation of reform policies are also deeply divided among the multiple layers of judicial authorities. Quite a few provincial level elites complained about the pressure they faced in capital trials after the launch of capital punishment reforms. A provincial-level judge reported that his court had to make an unwritten 'internal' guideline that any offence leading to the loss of more than one life should be punishable by death so that judges in any tribunal of the court would not sentence the defenders to death too liberally. Another respondent complained that almost every day there were victims' families and friends 'holding banners, claiming that they are aggrieved, and shouting in protest against failure to sentence the offender to death' 'rioting through the streets in front of the court'. She explained that concepts such as justice, human rights, and due process had little to do with her daily job, while maintaining social stability and appeasing public indignity were the main priorities:

'It takes great pain explaining to the victims' family [that the offenders do not deserve the death penalty]. They refused to grant mercy and leniency. They protest by burning themselves to death, committing suicides, carrying the dead bodies of the victims to the SPC in Beijing ... These guys, they spend years doing nothing but petitioning, know that we are afraid that their conduct may stir up the public indignation and they use this to pressure us. My hearts shivers at the

thought that the victim family of a case I handled would petition to authorities about their grievances on the ground that the defendant is not sentenced to death. I could get into trouble for this... I try my best not to send people up for petition. Yet the SPC instructs us to bring down the number of capital sentences. If I sentence someone to death, my verdict may be overturned. It is easier for the people 'at the top' to talk; but it is us who are stuck in a position between the devil and deep blue sea'.

In other words, the divergent attitudes between top-level elites and provincial-level elites are possibly a result of their different responsibilities, interests and the practical obstacles they face in their everyday work. It is commonly assumed that the Chinese state machinery is a monolith, where if the authorities at the top decide on a course of action, its agencies act in a uniform and concerted fashion to carry it out. In reality, various tiers of the Chinese legal apparatus fail to speak in a single voice. Decision makers at the top are mainly concerned about alleviating international pressures and preserving China's image as well as reputation by limiting the use of capital punishment. It is further down the chain of the penal apparatus that the administration of capital punishment is closely tied to the political tasks of maintaining social order and stability. It is also those legal professionals who had to endure the pressures from the victims' death penalty-seeking families and friends.

The conflicts were unsurprising – after all, in the post-2007 era, the SPC extended its reach into territories where political as well as institutional interests of local-level courts and government were well protected for a few decades. It would be difficult,

although not impossible, to combat the institutional inertia. Moreover, local and central judicial organs have different priorities in the administration criminal justice. Central political-legal authorities that are not directly responsible for maintaining social order would be sympathetic and willing to prioritize reforms to moderate the use of capital punishment. On the other hand, local government and law enforcement agencies who are constantly baffled by violent crimes and social unrest, tend to rely on harsh punishment as the short-run solutions to social problems and therefore are resistant to changes. Finally, post-reform trials are relatively more time-consuming and subject to rigorous scrutiny by authorities at higher levels, which demands more resources and have higher costs. This created tension between courts on the lower levels and local governments as the former are funded and judges appointed by the latter, who shoulder increasing financial burdens in the post-reform era.

Strict adherence to the reform policy of 'kill fewer, kill cautiously' fuelled the anger of the revenge-seeking victim families. Local riots, disturbances, and collective petitions were triggered by grievances and dissatisfactions of victim groups in the 'inappropriately' lenient treatment of capital offenders. Maintaining local stability and preventing residents from petitioning (*shang fang*) are essential tasks for local judges (Liebman, 2011a: 178). A local judge said that it is considered an essential skill to communicate with and appease the minds of victims' families and friends for judges, assistant judges and judicial clerks. Besides, the potential risks to judges' careers in local courts have grown larger following the loss of the review power to top judiciaries, as the evaluation of their performance is now ear-marked by incidents of miscarriages of justice. Intermediate courts who are responsible for first-instance

capital trials and higher people's courts who are in charge of second-instance capital cases are now subject to more rigorous scrutiny by higher authorities; it is increasingly difficult for them to cover up wrongful adjudications and silence the defendants. Redistribution of penal power requires great improvement in lower-level judges' skills, discipline and legal knowledge, which are far from being universally achieved across different regions in China and could only be obtained through painstaking learning and training.

To sum up, the decentralisation of power in dealing with capital cases would normally be accompanied by an increase in the volume of death sentences and executions, relaxation of legal procedures, politicized criminal justice administration at the grassroots of Chinese society and exploitation of power resources for personal and institutional gains. The recall of the review power over capital cases in 2007 has greatly alleviated these problems associated with the decentralization of penal power while placing greater pressures on local level legal professionals. Under the post-2007 penal power structure, institutional adjustments need to be made to create greater incentives and opportunities for members of lower-level judicial authorities to further restrict the use of capital punishment.

Section Three. Judicial Independence and Political Interference

Besides the above-mentioned tensions between elitism and populism and the uneasy relationship between national-level legal authorities and lower-level legal organs, the conflict between judicial independence and political interference also looms large.

The conflicting relationship between legal organs and political authorities has been alluded to in earlier discussions of the first two pairs of tensions. Politics and law are so closely related in the context of China's judicial system that people commonly use the combination of these two terms – politico-law or political-law (*zheng fa*) – to name institutions, schools, and occupations in the field of justice administration, as if law cannot be understood or operated without linking it to political and ideological forces. Indeed, the administration of penal justice is heavily influenced by an instrumentalist view – that law serves as an essential tool for political ends. There is also little doubt that capital punishment – central to China's penal regime – is pivotal to the implementation of political policies. As Johnson and Zimring argued, the Chinese capital punishment regime is 'political at its core' (Johnson and Zimring, 2009: 269).

Politicization of Penal justice and the Lack of Judicial Independence in Maoist China

In the 1920s and 1930s, judicial organs in Communist Kiangxi Soviet were institutionally subordinate to and supervised by the governing body of executive committee. For instance, under Zhang Wentian's hard-line penal policies in the era of Jiangxi Soviet (1933-34), judicial cadres were criticized for not having the 'right class consciousness' because they failed recognize social class as a conditioner of differential treatments during sentencing. For instance, according to the political ideology of class struggles, poor peasants should be treated with leniency while bad gentries should be punished severely. Judicial cadres failing to implement this class-line in penal justice thus were deemed as incompetent and 'politically wrong' (Griffin, 1976: 55). Even communist leaders who favoured a stricter adherence to legal procedures were criticized for being 'mechanic', 'legalistic' and failing to appreciate

that 'legal procedures can be changed and must not become an obstacle to the interest of the revolution' (Griffin, 1976: 139).

In the post-1949 regime, the politicization of penal justice did not stop at the institutional level; it went further to promote ideological propaganda aimed at changing the attitudes of individuals who were in charge of administering justice. Due to personnel shortage, the party-state initially had to rely on legal professionals trained under the 'old' Nationalist regime. Yet it abrogated all laws and regulations promulgated under the Nationalist influences soon afterwards. In February 1949, the Central Committee of the CCP instructed judicial organs to 'educate and transform' 'old' judicial cadres who had 'fuzzy', 'wrong' and 'harmful' views towards Nationalist laws, teaching them to 'despise and criticize' the 'Nationalist laws and all laws imported from bourgeois countries in Europe, America and Japan'. Instead, judicial cadres were instructed to study and master Marxism-Leninism and Mao Zedong Thought (The Central Committee of the Communist Party of China, 1949). In particular, 'old' and 'bourgeois' concepts and doctrines of separation of power, judicial discretion, and presumption of innocence were all abandoned (Yu, 1989: 34).

Judicial independence at that time was viewed at most as a myth and disguise of the 'bourgeois' rule in Western countries (Li and Li, 1952). Believers in judicial independence were considered by the ruling party-state as disloyal to the regime and were criticized, disciplined and punished in the early 1950s. One *People's Daily* article claimed that the judicial cadres subject to 'thought education' and criticisms should 'clearly realize' that procedures, formalities and official jargons were merely products of 'reactionary' laws and a means to 'fetter and embarrass' the toiling

masses (Reporter, 1953). During the Campaigns to Suppress Counter-revolutionaries, judicial cadres were repeatedly criticized for being too soft on counter-revolutionaries and were forced to make 'self-criticisms' for their failure to do so (Zhu, 1950; Yu, 1951; Hebei, 1951). Being 'politically correct' became one of the prerequisites to secure a job in the PRC's justice administration.

Mao's disrespect for legal bureaucracies and judicial cadres reached another peak, following the Campaigns to Suppress Counter-revolutionaries, during the 1957 Anti-Rightist Campaign. The temporary ascendancy of the status of judicial institutions in state machinery during the mid-1950s came to an abrupt halt with the advent of political purges (Leng, 1982). Senior staff in the SPC were accused of endangering the 'proletarian dictatorship' because they considered mitigating circumstances which could spare capital offenders from the ultimate punishment when handling cases (Reporter, 1957b). 'Rightist' judicial cadres were purged for sabotaging 'people's proletariats' by believing in concepts such as judicial independence (Reporter, 1957c; Han, 1958). The subsequent Cultural Revolution (1966-1976) took this political control over judicial work to an extreme – legal apparatus including the public security organs, courts, procuratorates were completely dismantled, and political organs as well as mass organizations were instead empowered to decide on life-or-death matters. Leng Shaochuan described this lawless period as 'the most regressive period of China's legal life' (Leng, 1982: 205). In sum, the Maoist capital punishment regime required that the primary utility of the regime was to serve as a tool for class struggle, political repression, and ideological control (Johnson and Zimring, 2009: 257-262; Zhang, 2008).

The Aspirations of Judicial Independence in Deng-Jiang Era

Under the rule of Deng Xiaoping and Jiang Zemin, China's judiciary continued to suffer from insufficient judicial independence. This is especially true for courts at lower levels that were kept in the firm grip of local governments (Leng, 1982: 208-209).⁹⁸ Local courts depended heavily on governments at the same level for funding; judges in local courts were appointed by the NPC at the corresponding level and were subject to the supervision by local-level procuratorates, the NPC, the CCP, and other social organizations and groups. As Peerenboom (2002: 280-342) concluded, China's judiciary in the reform era lacks institutional independence – it was susceptible to *external* interference from the Party, other branches of government, and various members of society. In addition, it had an insufficient amount of *internal* independence as the judges are frequently deprived of the power to decide on cases independently by the politico-administrative segments within the courts.

On the other hand, judicial independence received official recognition in law in the post-Mao era. At least as a symbolic gesture, political leadership at various levels turned away from flagrant political interference with legal decision-making processes (Findlay, 1992: 87) including the adjudication of capital cases. The idea that Chinese courts as a whole might be independent from outside influence was initially seen as

⁹⁸ In practice, local governments and Party organs were able to exert pressure on courts as they control the funding of courts. They also have an important say in appointing, rewarding, and disciplining judges and other judicial staff working in the courts. This party control over court personnel is one of the important reasons for the lack of judicial independence in China. Donald Clarke cited a Chinese saying in his article that 'if you eat from his bowl, he has control.' (Clarke, 1991: 64)

an innovative and even dangerous idea under a regime where the state continues to be conceived as the guardian as well as the embodiment of the will of the proletariat (Findlay, 1992). Indeed, even the mere rhetorical recognition of limited autonomy of the judiciary was a significant improvement from Maoist rejection of judicial independence.

The acceptance of the principle of judicial independence into mainstream political and legal discourses was partly due to legal reform in the Deng-Jiang period, an era featuring the most robust and comprehensive building of legal institutions, promulgations of laws and training of legal professionals. Meanwhile, there were limited but perceptible progress towards greater autonomy and raised position for courts and judges in China. Central to this progress towards legal modernization was the elevation of courts to the heart of the re-established, formalised justice bureaucracy (Findlay, 1992). The principle that the judiciary is independent from external interference by any individual, group or social organization, was finally enshrined in China's Constitution as well as major criminal statutes (Tanner, 1999: 50-51; Findlay, 1992).

At least in theory, the courts became more autonomous and improved in prestige in this era. Compared to the 1954 Organic Law of the People's Courts, the 1979 Organic Law of the People's Courts provided that courts were responsible for corresponding level NPC's, rather than governments.⁹⁹ Moreover, the power to review and approve capital cases was bestowed in the SPC by the 1979 Organic Law

⁹⁹ However, the people's congresses, both at the National level and at the local levels, were regarded as rubber stamps for the Party.

of the People's Courts. It seemed that the recognition of courts – rather than the public security organs or the procuratorates – being the centre of the socialist legal apparatus was increasingly acceptable (Findlay, 1992: 87) to legal professionals at both central and local levels. Similarly, the idea that courts are an impartial arbitrator of disputes, rather than a means of implementing party policies, was acknowledged after difficult and gradual adjustments from the ubiquitous Party dominance over judicial organs in Maoist China.

With all the rhetoric appeal to judicial independence, however, party leadership was exercised not only at the adjudication of specific cases, but also at the level of general policy-making (Clarke, 1991: 62). Party dominance in judicial processes continued to be perceived as legitimate at all levels (Tanner, 1999: 77-79, 82; Shen, 2000: 30).

Harold Tanner cited an example that in Zhejiang there was a county party secretary who required judges to include political slogans in case decisions. When rejected by the court, he angrily accused the president of the court of 'using law to resist the Party' (Tanner, 1999: 52). Not only did the local Party committee members feel right and proper to interfere with penal decision-making, the president of the SPC thought alike. Jiang Hua, the then president of the SPC (1975-1983), called judges who asserted the principle of judicial independence as 'arrogant and inflexible'. As late as February 1988, the *Legal Daily* published a news report that the Beijing Municipal Party Committee had only 'in recent years' stopped the practice of approving decisions made by judges (Clarke, 1991: 63). Further, enforcing court judgements against any defendant who was well-connected or politically powerful was frequently difficult. Thus even if the court was able to decide on a case strictly according to the

law, free from interference from the party and government, it still lacked sufficient bureaucratic clout to enforce its decisions (Clarke, 1991: 65-69).

The juxtaposition of judicial independence and party leadership was indeed the embodiment of 'the tangled imperative of Chinese modernization' (Findlay, 1992: 88). To a certain extent, it represents the fundamental contradiction between market-driven socio-economic reform and the maintenance of political authoritarianism. As aptly described by Trevaskes (2007a: 189), the conundrum faced by many judicial officials was that while they understood the need for judicial independence, they were required to administer law in a political-legal environment where law served as the means for political aims. In 1981, a *People's Daily* article praised the police for cracking a capital case involving murder and arson within eighteen hours in Hebei. It explained that the key reason for succeeding in solving the case rapidly was the leadership of the Party and the support of the masses, commenting that it would be a misunderstanding to assume that judicial independence meant complete independence of the judiciary from Party leadership. According to the article, 'Party leadership and judicial independence does not necessarily contradict with each other' (Wen, 1981). This may be true to a certain extent, however, in most cases, political intervention in the trial, sentencing and review of capital cases reduced the legal requirement of the rule of law and due process to empty words.

Political control of legal bureaucracies facilitated the excessive and speedy use of capital punishment as required by the central party-state during Strike Hard Campaigns. Under toughened-up penal policies, judiciaries, under the pressure of the Party and government, increased the use of capital punishment as an assumed-to-be-

effective deterrent to bring down the rates of crimes in the short term. Public security organs, the procuratorates and the courts handled cases jointly under the auspices of the Party (Tanner, 1999: 74-75; 82; Trevaskes, 2007a: 150-151). Party committees at various levels even held the power to review the decisions of capital cases in practices (Findlay, 1992: 86). In 1979, the then President of the SPC, Jiang Hua explained that the SPC was merely the symbolic holder of the life-or-death decision power while the real power resided with the Party:

Right now, capital cases are referred to the provincial party committees for approval, and the types of capital cases and criminal cases involving foreigners are brought together to the SPC, which reports them to the Party Centre for approval. If they pass the criminal law and the criminal procedure law at the next National People's Congress, then capital cases will have to be heard or approved by the SPC. In fact, the power to impose the death penalty resides with the Centre, but in the law we have to write that they are heard or approved by the SPC. (Tanner, 1999: 51-52 and 79)

Courts remained highly politicized in the era of Jiang Zemin but 'a norm of judicial independence has been declared (in the 1994 Judges' Law and elsewhere)' and greater independence were seen in the adjudication of cases that 'were not sensitive enough to draw interference from Party authorities'(Nathan, 2003: 12). Jiang publicly endorsed the courts to 'independent exercise of judicial power' under Party supremacy. In his reports respectively to the Fourteenth (1992), Fifteenth (1997) and Sixteenth (2003) Congress of the CCP, Jiang repeated an almost identical sentence –

‘(the Party) will provide institutional guarantees to ensure that judicial organs can independently and impartially exercise their powers to prosecute and to adjudicate according to the law’. Evidently, Party-made policies and guidelines were still deemed as the supreme rules of the exercise of penal power, including the use of capital punishment. The policy-driven overuse of capital punishment during Deng-Jiang’s era, to a large extent, was the result of political intervention in judicial decision-making processes and were the best indicator of the direction of the political wind.

The Thin Judicial Independence under the Rule of Hu-Wen

Under the administration of Hu Jintao and Wen Jiabao, the Party and government continued to exert political influence over courts. There was no real *separation of power* between the executive and the judicial branches in China; what existed was merely a *division of labour*. Interviews with legal professionals in China indicate that although China’s courts appear to have greater institutional autonomy and independency, they are not even close to being insulated from external interference by individuals, the Party, local governments and various organizations. Judicial independence was frequently reduced to an abstract, symbolic and rhetorical slogan with no real binding force in practice. Some of my interviewees reported that, as recently as 2010, Adjudication Committees still have the final say over the decision in high-profile or controversial cases. For instance, a judge reported that: ‘decisions made by judges in capital cases which are either politically-sensitive or may trigger large-scale popular petitions usually are not deemed ‘final’. Decisions will become

legally effective upon approval by various “authorities” inside the court, such as the president of the collegial benches, joint meeting of presidents of collegial benches across the court, and, finally, the Adjudication Committees.’

Recently, pressures from mass media and the community of internet users in particular, claiming to represent popular opinion, led political authorities to intervene in the adjudication of capital cases. The drives towards greater economic liberalisation, social diversification and political fragmentation in China’s reform era made the state less powerful to orchestrate and manipulate public opinion at will. Instead, it became more likely for the party-state to lose control of non-state-run mass media, especially the internet, and public voices expressed through these venues. In this context, the political intervention in judicial decision-making processes took on new meaning and was demanded by new necessities. The impact of public sentiments on judicial bodies, endorsed by political authorities, loomed large in China’s institutional environment, where the social and penal arrangements buffering against populist pressures – commonly seen in the European societies – almost do not exist even after the extensive legal reforms in Deng-Jiang era.

By pushing courts to feed the popular demand for revenge and justice, China’s party-state sought to demonstrate that it has the people on its side and that it truly represents the best interests of the majority populace. Indeed, this political intervention in judicial decision-making and policy-making, on the basis of popular will, seems to become the new governing strategy of the ruling regime and a source of the Party’s legitimacy in today’s ‘contentious politics’ (Cai, 2008). In the context of capital punishment administration, the political authorities appear to be willing to

compel legal organs to yield to oppositional grassroots pressure whenever this pressure is strong enough to pose a threat to the legitimacy and authority of the state. As stated previously in this thesis, state legislators were forced to amend their draft legislation to vent public dissatisfaction and judges are compelled to align their judicial decisions with the vengeful demands of the general public and individual petitioners in high-profile cases. The lack of judicial independence, arguably, has been a significant institutional constraint on capital punishment reforms.

None of these would occur, if current institutional arrangements allowed judicial authorities to build up strong centrifugal forces demanding autonomy and independence to resist the undue intervention by all sorts of political forces and institutions. Powerful influences of a populist approach to penal justice, combined with limited judicial independence, have proven detrimental to judicial and legislative efforts to restrain China's profligate use of capital punishment as a sanction. Yet it seems to be a mistake to assume that judges have absolutely no power in the processes of penal policy-making and adjudication of high-profile capital cases. In fact, the progress towards greater independence, authority and raised status of the courts among politico-legal branches of state apparatus continued in the era of Hu-Wen. This sustained progress is one of the most important institutional conditions that made the elitist, court-centred reforms of capital punishment possible. After all, it was China's top judiciary that participated, influenced, and initiated the recent capital punishment reforms.

Conclusion

This chapter shows that all of the high tides of executions that occurred in China's penal history were linked to a politicized administration of capital punishment. During these historical periods, popular justice has prevailed over judicial autonomy, the Party's political will has trumped judicial independence, and decentralized capital procedures have led to an excessively liberal use of capital punishment at the local levels. At the heart of this politicized use of capital punishment is an instrumental approach to capital punishment. This has been determined by the political ideologies, institutional structures of and the socio-political conditions formed by and acting on the administration of capital punishment in China during various historical periods.

The deeper political meanings associated with the instrumental use of capital punishment in China have varied over time with the changing political needs of authoritarian governance. In Mao's era, it served as a means of eliminating political opposition, while in the Deng-Jiang period it functioned as a tool for crime control. In Hu's 'harmonious society', it is an essential instrument for mediating 'social contradictions' and upholding public confidence in the Party's legitimacy. The administration of capital punishment in China thus fluctuates between populism and elitism, between judicial independence and political intervention, between centralized judicial administration and decentralization in penal power. All the shifts and changes to capital punishment law, policies and practices serve key purposes in political governance – to vindicate the authority of the party-state and strengthen its rule.

This chapter argues that the post-2006 top-down, elite-led capital punishment reform initiatives arose in the shifting ideological, institutional and structural tensions. Specifically, the rise of elitist views of penal regulation and moderation, the ascendancy of judicial independence, and the shifting power structure among national-level and local-level judicial authorities have created opportunities and momentum for the recent capital punishment reforms. In contrast, populist ethos that permeated the administration of capital punishment, the omnipresence of political intervention in legal policy-making and decision-making, and the unsupervised local judicial decision making process, have acted as constraints on China's move towards moderate use of capital punishment and its eventual abolition.

The impact of the three sets of tensions on the capital punishment regime in China seems to be interrelated and mutually reinforcing. In the climate of an authoritarian state such as China, the preoccupation with capital punishment by the public is a strong motivation for the political authorities to push judicial organs towards more wanton use of death penalty. Strong appetite for penal harshness will also prompt local political authorities to exert pressures on judicial organs to satisfy the popular desire for vengeance and to main social stability in local areas. This toughening-up of capital punishment policies will further enlarge the divergence between national-level judiciary attempting to promote reforms and local-level judicial organs troubled with local disturbances and pressure from victims groups. The unscrupulous accommodation of popular impulses for punitiveness by political and legal authorities, in turn, encourages vengeance-seeking groups to use their power to influence public sentiments and eventually the decision-making process in capital cases. Breaking these vicious cycles of mutual reinforcement therefore is a

precondition for effective and substantial curtailment of the use of capital punishment in law and in practice.

Chapter Five. Examining China's Responses to the Global Campaign against the Death Penalty

Introduction

Inspired by the worldwide campaign against the death penalty spearheaded by European countries, the reforms of capital punishment law and policies in the China in recent years have caught the attention of global media. These reform initiatives, launched around 2006-2007, signified a cautious and incremental attitudinal shift away from this country's previous habitual reliance on capital punishment as a key penal instrument to maintain social order and tackle crime problems in China's post-1978 market reform. China's reforms of its capital punishment policies, law and practices in recent years invite us to examine the global transfer and cultivation of reformist as well as abolitionist sensibilities in the local institutional and cultural environment in China.

This necessitates an understanding of not only global abolitionist values and initiatives against the death penalty, but also of the local politics of reform and the existing institutional as well as ideological constraints on reform in China. For instance, the contemporary official policy towards capital punishment in China is aimed at civilizing its capital punishment machinery, rather than fully embracing abolitionist aspirations. What motivates China to choose an approach of incremental reforms, rather than abolition in one move? Although China has made several

laudable adjustments to its capital punishment regime since 2006, it is widely recognized that it has yet to fully respect existing international standards on the use of the death penalty. Why is it so? This Chapter contributes to the existing body of literature on China's capital punishment regime by focusing on the transmission and diffusion of international norms and values in this jurisdiction.

Specifically, the first section of this Chapter traces the transformation of China's attitudes towards human rights in the past few decades. It narrates the shifts in China from human rights being considered an alien concept against the grain of the Chinese orthodox ideology and culture, to human rights being conditionally accepted into mainstream political and legal discourses. Section Two explores how the socializing process of international human rights forces, i.e. persuasion and acculturation, have taken force to compel and induce changes to China's beliefs and practices in the field of capital punishment. Two case studies, one highlighting the difficulty for the Chinese central government to implement bans on the practice of shaming parades before executions, and one focusing on the case of Akmal Shaikh, provide proof in Section Three that China's resistance to international human rights forces has been reinforced by populist impulses and local institutional predicament. Section Four endeavors to shed some light on the drivers behind the international-inspired attitudinal transformation in China by analyzing findings from an elite interview study conducted in 2010.

This chapter presents seemingly contradictory evidence with regards to the impact of international mechanisms. On the one hand, it concludes that the influences of human rights ideas and norms on China's capital punishment regimes to date have

been significant. On the other hand, the impact of external forces also remains limited as their diffusion into Chinese society encountered considerable local predicaments. This conclusion – that China is both sensitive and resistant to the influences of international forces – may be criticised for being ambiguous and confusing at first sight. A possible explanation for this ostensible paradox is that the pressure from abroad is just one of the forces that shape China's death penalty policy. A whole range of domestic factors have been shaping the changes of Chinese capital punishment apparatus and international forces, despite of its apparent significance, is not the sole determining factor.

Section One. China's Changing attitudes Towards International Human Rights

China's attitudes towards the value and concept of human rights have undergone a change from formal rejection to conditional acceptance since the state-making of the PRC in the mid-20th century. The relevance to discussing the advancement of China's willingness to respect human rights in this chapter derives from the belief that the use of capital punishment has, to a certain extent, been transformed from a criminal justice issue into a human rights issue (Zimring, 2003: 16). The emergence of a human rights perspective in the immediate aftermath of the Second World War has enabled abolitionists to view the topic of capital punishment, a former domestic criminal policy issue, from a human rights perspective beyond national borders. The ideological underpinning of this approach rejects utilitarian justifications and retribution, which once prevailed in criminological discourses (Hood and Hoyle, 2009).

Anti-death penalty activism in China arose in this environment where human rights dynamic was slowly making their way into the terrains of criminal justice, criminology and various aspects of domestic political life elsewhere in the world. As the human rights approach quickly became the preferred theoretical weapon for abolitionists in debates and discourses worldwide, abolitionists in China also found themselves a platform from which to engage with Chinese policy makers by drawing on the global dynamics of human rights. As a result, an exploration of the broader debates on human rights in China during the past few decades may help to evaluate the evolution of China's use of capital punishment over time.

China's Relationship with the International Community

Under Mao Zedong's rule (1949-1978), China was almost completely isolated from the mainstream international society until its relationship with the USSR deteriorated in the 1960s. China formed a fraternal alliance with the Soviet Union in the 1950s, joined the Communist bloc, and participated in direct and indirect military clashes with the US and US-led UN forces during the Cold War. This led to the exclusion of China from most aspects of the international community. The US played a crucial role in ensuring this containment. Beijing was cut off from bilateral diplomatic relationships with a majority of the world's countries until the 1970s, and from membership of the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD) – the World Bank – until 1980 (Foot, 2000: 15-16).

In the late 1960s and early 1970s, however, the Sino-American relationship began to show traces of improvement (Yang, 2000; Oksenberg, 1982-1983: 175), based on mutual interests and potential benefits derived from an anti-Soviet partnership. The Sino-American rapprochement in the late 1970s marked an era of China's new open diplomatic strategy. With Washington's reduced support for Taiwan (Republic of China) to be a member state of the UN¹⁰⁰, China took its official seat in the United Nations Security Council in 1971 and began its fuller participation in various international organizations. The last three decades of the 20th century saw China's increasingly active participation in the global community.

China became a committed member of the international institutions soon afterwards. China established and re-established bilateral diplomatic relationships with 72 countries throughout the 1970s; it began the two-decade long preparation for joining the General Agreement on Trade and Tariffs (GATT) and later the World Trade Organization (WTO); it started its partnership with the World Bank and IMF in 1980; it sought membership of the UN Special Committee on Peacekeeping Operations in the 1980s; it signed and ratified more than one hundred international conventions and treaties in the 1970s and 1980s; it took over Hong Kong and Macau in 1997 and 1999; it appeared as a rock of stability in the stormy East Asian

¹⁰⁰ The second trip to China by Dr. Kissinger, President Nixon's Assistant for National Security Affairs, immediately before the vote in the UN on the questions of China taking up the seat allocated to Taiwan, may have encouraged nations in the UN to vote in favour of China. Visible signs of improvement in the Sino-US relationship were accompanied by voting to admit the People's Republic of China and expel Nationalist China from the UN General Assembly.

Financial Crisis in 1997 as well as the 2008-2009 subprime mortgage crisis; and it successfully hosted the Olympics in Beijing in 2008.

Gaining credentials required for participation in most international clubs, China quickly grasped the game rules. With an increasing capacity to position itself on the world stage, China has become more assertive, influential and proactive in articulating its preferences and interests in international institutions, to name a few: China's growing influence in shaping the policy making in both the IMF and the world bank; China's ability to shift the G-20 agenda away from issues it prefers not to discuss; and the negotiating skills China brought to bear in ensuring an outcome to the Copenhagen Climate Summit that was almost entirely in line with its own objective (although it lost many friends in the process).

However, as of the 21st century, it is generally agreed that China remains a non-democratic society with rapid-changing social architecture and culture. Its traditional culture still has a direct or indirect bearing on everything, including a heritage of ancient Confucianism and Legalism. The Marxist-Leninist-Maoist-Dengist ideology continues to dominate the socio-political sector today.

China's Evolving Attitudes towards Human Rights

The concept of human rights was alien to Chinese society and had never been fully or substantially realized¹⁰¹, even if it could be proven that the Chinese-native Confucianism has components compatible with modern human rights values. Confucian elements that seem familiar to western observers, e.g. the encouragement of resistance to authority and freedom of speech, were tailored for the political goals of tighter and better control of a hierarchical society. Rooted in an undemocratic feudal China, Confucianism served the best interests of the imperial rulers and privileged bureaucrats, rather than safeguarding the rights and interests of commoners.¹⁰²

The 'People's Rights' in Maoist Era

Soviet Marxism-Leninism gained popular support from Chinese farmers and workers, and soon become the orthodox ideology in socialist China. It was alleged that one of the pivotal goals of the socialist government was to secure the welfare and best interests of the people. Ironically, the concept of human rights, because of its ideological roots in Western philosophical and political thinking, was considered a taboo under the rule of Mao Zedong. The West's efforts to promote human rights in China were (and may have continued to be) perceived as evidence of Western hegemony and domination. The concept of human rights only began to appear in

¹⁰¹ It is important not to take the international human rights norms as a given. Although human rights are considered shared understandings of all mankind, the universally-applicable international human rights norms were originally derived from Western legal cultures and it were mainly the interests and preferences of Western states that determined and continue to determine their shape.

¹⁰² The author is aware of the risk involved in this personal observation that summarizing things in such simple terms may not do justice to the richness and complexity of Confucianism.

official as well as public discourses as China began to join the world community in a meaningful way in the 1980s.

There is a considerable body of literature in the West devoted to criticising China's 'notorious' human rights record. Nevertheless, it would be 'wrong to assume that the Chinese regime has been completely hostile to the idea (of human rights)' (Weatherley, 1999: 101). Even before China's full integration into global society, China was never absolutely rejecting 'human rights'. An example in point was Premier Zhou Enlai's statement¹⁰³ about China's willingness to embrace the concept of human rights and the Charter of the United Nations in a 10-point Bandung Declaration on the Promotion of World Peace and Cooperation (the Final Communiqué of the Asian African) in 1955.

Another example that helps to explain China's partial acceptance of human rights during the early years following the socialist state-making was the Provisional Constitution of the PRC. The Provisional Constitution recognized Chinese citizens' freedom of thought, media, communication, migration, etc. although the term 'human rights' never appeared in China's legal documents, official directives and pronouncements, mass media reports or public discourses under the leadership of Mao Zedong.

¹⁰³ Due to the lack of other sources of information, a close examination of official political discourse by Chinese political leaders may serve as 'a valuable means of gaining insight into the way the core leadership wants policy to be understood and presented.' (Foot, 2000: 101)

Political figures used phrases of ‘the people’s rights’ or ‘the citizens’ rights’, originated from Marxism-Leninism, to substitute the concept of ‘human rights’, referring to the rights of the Chinese citizen at that time. This ‘people’s rights’ ideal is fundamentally different to the Western liberal notions of human rights in that it rejects the universality of human rights protection. For one, it explicitly acknowledges and encourages majoritarianism—the idea that the party-state serves the needs and interests of the *majority* and the *majority* only. Secondly, per its literal meaning, it requires distinguishing ‘the people’ from ‘the enemy’ (both of which are Chinese citizens),¹⁰⁴ and depriving the rights of the latter group.

A closely-related concept, ‘the people’s democratic dictatorship’, was coined by Mao Zedong in June 1949. He further explained that such dictatorship means that the people can enjoy democracy while the enemy will be the target of punishment by the people’s dictatorship (Mao, 1949). He proudly stated that ‘it is a crime against *the people* to treat *the enemy* with mercy’¹⁰⁵ (Bakken, 2011). The combination of majoritarianism and the people-enemy dichotomy is a dangerous one in that those who fall under the categories of the ‘minority’ or the ‘enemy’ are deprived of their basic rights and needs.

¹⁰⁴ Mao Zedong has discussed the definition of ‘people’ and ‘enemy’ at length in quite a few of his articles. The most profound discussions can be found in one of his articles, On the Correct Handling of Contradictions among the People, written on *February 27, 1957*. He pointed out that ‘the concept of “the people” varies in content in different countries and in different periods of history in a given country.’ After the PRC was founded, in ‘the period of building socialism, the classes, strata and social groups which favour, support and work for the cause of socialist construction all come within the category of the people, while the social forces and groups which resist the socialist revolution and are hostile to or sabotage socialist construction are all enemies of the people’. See (Mao, 1977)

¹⁰⁵ Lenin had similar comments. He wrote: ‘No mercy for these enemies of the people, the enemies of socialism, the enemies of the working people! War to the death against the rich and their hangers-on, the bourgeois intellectuals; war on the rogues, the idlers and the rowdies!’ (Lenin, 1965)

Moreover, there was a thin line between the 'enemy' and the 'people' as these concepts are left undefined. This resulted in millions being prosecuted and persecuted under Mao's rule. Worse, this denial of the rights of the minority still dominates the mentality of some legal practitioners today. As a matter of fact, the parameters of the concept of 'the enemy' were ever-expanding under Mao's rule. Politically-defined groups such as land owners, rich peasants, counter-revolutionary forces, 'bad elements', rightists¹⁰⁶, intellectuals, and anyone who dared to challenge Mao's policies fell into the category of 'the enemy' one by one during China's ceaseless mass-motivated political campaigns during 1949-1977.¹⁰⁷

Apart from the millions who died by starvation and violence as a result of the Great Leap Forward Campaign¹⁰⁸, and the brutal repression of human rights during the Cultural Revolution¹⁰⁹, each campaign has its casualties. Ironically, the 'people's

¹⁰⁶ According to the Notice on the Standards of Defining Rightists issued by the Central Committee of the Chinese Communist Party on 15 October 1957, 'rightists' include anti-socialism activists, those who oppose dictatorship of the proletariat and the principle of democratic centralism, those who attack the leading role of the Communist Party in the socio-political life of Chinese society, those who sabotage the people's union in order to attack socialism and the Chinese Communist Party, those who organize and participate in anti-socialism and anti-Communist Party societies, those who intended to overthrow Party leaders in various departments of the government or local unites, those who provoke anti-Communist Party and anti-people's government riots, those who help in planning, networking, divulging intelligence and classified information of the revolutionary organization to them. The Notice also defined those who are not rightists and who are the far-rightists. (Reporter, 2003)

¹⁰⁷ These campaigns include the Campaign to Suppress Counter-Revolutionaries Forces (1950-53), 'Three-anti and Five anti Campaigns (1951-1952), Agricultural Collectivization (1953-56), the Anti-rightist Campaign (1957-58), the Great Leap Forward (GLF) (1958-1961), the Four Clean-ups (1963-1966), and the most notorious Cultural Revolution (1966-1976). It is commonly assumed that the GLF includes the Campaign to switch over to People's Communes (1958). Three Anti refers to campaigns against corruption, squandering, and bureaucratism in organizations affiliated to the Communist Party and the Chinese government; Five Anti means campaigns against bribery, tax invasion, theft of state property, cheating in work and cutting down on materials, and theft of state economic intelligence.

¹⁰⁸ There has been no academic consensus on the figure of death during those years of the Great Leap Forward. Jung Chang and Jon Halliday believe the number is close to 38 million; an authoritative account by Yang Jisheng stated that the death toll from the Great Chinese Famine reached 36 million; Frank Dikötter, based on recently accessible Chinese archival sources, places the death toll at 45 million minimum. (Chang and Halliday, 2005; Dikötter, 2010; Yang, 2008)

¹⁰⁹ Scholars claimed that this blood-stained era of the 1950s witnessed a death toll of approximately 710,000 in the Campaign to Suppress Counter-Revolutionary Elements and over 20,000,000 deaths during

democratic dictatorship' turned out to be a regime under which the destiny of the majority was controlled and manipulated by a minority of political leaders. During Mao's rule, there were only two basic laws in China-the Constitution and the Marriage Law, and even this deficient legal system did not escape the fate of being fundamentally destroyed in the Culture Revolution as public security bureaux, people's courts, and people's procuratorates were dissolved.¹¹⁰

This initiative to attack the authority of the police, the courts and prosecutorial organs was an ultimate expression of Mao's mass-line political approach to 'seize power'. It was one of Mao's dreams in his late years that the country should rely on 'revolutionary masses' to maintain social order, creating a viable substitute for bureaucratic Party regime, government apparatus and legal system. In fact, Mao instigated frenzied Red Guards and revolutionary rebels to show contempt of authority of any kind, including the authority of new 'revolutionary' institutions and even that of the Party centre (Bridgham, 1968). It turned out that this 'revolutionary order' led to a chaotic nation-wide violence and disorder both in cities and the countryside.

the Cultural Revolution from 1966 to 1976. In the Second Plenary Session of the Eighth Central Committee of the Communist Party of China (1956), Chairman Mao Zedong once commented, in response to the fact that during Stalin's reign at least one million people were executed, 'we have killed at least 790,000 counter-revolutionaries during the few years after the establishment of the PRC, imprisoned more than a million, and put over a million on paroles.' In the 1957 Moscow Conference of Representatives of Communist and Workers Parties, he even spoke of the possibility of sacrificing three hundred million lives for 'the cause of global revolution' (Qing, 1999; G, 1963; Guo, 2011b).

¹¹⁰ In 1968, Mao Zedong, the Central Committee of the Communist Party, and the 'Central Cultural Revolution Group' approved that the SPP, the SPC and the Ministry of International Affairs (MIA) should be abrogated. In 1966, Mao's wife, Jiang Qing, berated the Beijing Public Security Bureau, the Supreme People's Court (SPC) and the Supreme People's Procuratorate (SPP) as 'bourgeois in nature' and called upon the Red Guards to 'rise up in rebellion' and take over these government organs. (Bridgham, 1968: 6-37)

China's Attitudinal Change towards Human Rights in the Post-Mao Era

China's attitudes towards human rights began to change substantially after it gradually integrated into the global community and adopted market-based reforms under the leadership of Deng Xiaoping in the late 1970s. The initial post-Mao period (1978-1989) saw some strong resistance to the idea of human rights, which saw human rights as a taboo because of its alleged capitalist origin. This residue cold-war ideology continued to dominate academic, political and judicial circles in China. On the one hand, the US tended to (and maybe has continued to) clothe its anti-Communism and anti-Chinese political agenda in human rights rhetoric.¹¹¹ This promotion of human rights thus was perceived by China as a dangerous way of undermining the legitimacy of the Chinese government and Party.

Despite these ideological obstacles, China's attitudes towards human rights accelerated in the 1980s. China's interest in UN human rights bodies coincided with a period in which it began to play a full role in the UN (Kent, 1995: 7). Chinese delegations attended the United Nations Commission on Human Rights (UNCHR) as observers in 1979, 1980 and 1981 respectively, and finally became a member of the Committee in 1981. It also signed, ratified, and participated in drafting a number of international conventions throughout the 1980s.¹¹² With significant economic,

¹¹¹ For example, US former President Ronald Reagan once coated anti-Communism with human rights shells, talking about 'a global campaign for freedom...[that would] leave Marxism-Leninism on the ash heap of history as it has left other tyrannies which stifle the freedom and muzzle the self-expression of the people'. (Reagan, 1982: 4)

¹¹² China participated in drafting a series of human rights conventions, including the Convention on the Rights of the Child, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Declaration on the Right and Responsibility of Individuals, Groups

strategic and demographic weight in the global community, China's joining the human rights regime has legitimated its ambition to become a key member of international community.¹¹³ China's increasing involvement in international human rights institutions also led to greater domestic openness on the topic. In June 1985, Deng Xiaoping, China's *de facto* leader, for the first time, talked about human rights and brought the hope for wider public discourse and debate on the topic.¹¹⁴

The Chinese government's previous tight social control during Mao's rule made it difficult, if not impossible, for western observers to understand the human rights conditions in China. As Deng's opening-up and reform initiatives led to relatively looser information control and increase in human rights diplomacy¹¹⁵, it became a target of increasingly intensive criticisms (Nathan, 1994: 631-632). World attention on China's human rights practices rose to an unprecedentedly high level with the occurrence of the Tiananmen Square Incident in 1989, which was perceived as a backlash against the advancement of China's human rights causes.

and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, and the Declaration on the Right to Development.

¹¹³ However, China's involvement has also exposed the weakness of the human rights regime. (Foot, 2000: 2)

¹¹⁴ He based his concept of human rights on Mao Zedong's majoritarian 'people's rights'. He remarked that the concept of 'human rights' in China was fundamentally different from the western notion of 'human rights', and that China's human rights belongs to the majority of the People. In his opinion, 'the minority should yield to the majority'. He said: 'What are human rights? First of all, how many people we are talking about? Do they refer to a minority of people's human rights, or the human rights of the majority throughout the country? The so-called 'human rights' in the western world are, in essence, fundamentally different from ours. We hold different points of view'. (Deng, 1993: 125)

¹¹⁵ Evidence in this regard includes the release of millions of political victims, dissolution of the caste-like 'class status' system, promoted economic freedom and provision of economic and social rights, extending the length of compulsory education from six years to nine, increasing average life expectancy to 70 years, promoting direct elections at the local level, promulgation of a number of basic legislation (including Constitutional Law, Criminal Law, Criminal Procedure Law, Civil Law, Civil Procedure Law, etc.), lifting bans on students to study abroad, promulgating specific policies and laws to protect children, women, the aged, and the disabled, and so on. (The Information Office of the State Council, 1991b)

The Tiananmen Square Incident happened at a time when political and economic sanctions were becoming increasingly common as a tool of human rights forces. Although a few countries remained silent or even supported the Chinese government, the mainstream international reaction following the Tiananmen Square Incident was particularly strong against Beijing. Foreign loans to China were suspended by the World Bank, Asian Development Bank, and various governments. The United States as well as the European Economic Community imposed sanctions including suspension of inter-governmental sales, suspension of high level contacts, cancellation of governmental loans, and imposition of arms embargos against China (The EU has maintained this arms embargo to China to this day)(Youngs, 2001: 166-167; Baker, 2002: 49-50; Casarini, 2006; Malloy, 2001: 80).

According to estimates, international trade accounted for twenty percent to a third of China's gross national product (GNP) at that time (Seymour, 1990: 3), suspension of international sales and tourism thus severely affected the Chinese economy. Among others governments and organizations, the World Bank suspended its 230 million US dollar loan and Japan froze its 5.7 billion US dollar loan to China. The chilling effect following the event affected the willingness of foreigners to do business with China in the long-term (Seymour, 1990: 5; Brunner et al., 1993: 382).

The economic sanctions and military embargos were classic examples of a 'carrot and stick' *coercion* (Goodman and Jinks, 2004: 633-634) in international human rights law. These coercive methods can create an immediate and visible impact on the targeted state but may not be the optimal way to influence a country's human rights practices. First, as with all sanctions, the economic hardships that resulted from these

sanctions were inflicted on the public and business owners within the state; no direct punishment is afflicted on the government. In the case of China, even back in the immediate aftermath of Tiananmen Square Incident, the Chinese government and political leadership was clearly undeterred and was prepared to weather through the economic sanctions.¹¹⁶ After all, genuine and sincere change of behaviour cannot be promoted on the basis of fear, power and coercion alone. It is well known that only decisions made out of voluntary choices of the target states can sustain even if the external pressure is removed or no longer important as the balance of power changes (Goodman and Jinks, 2004: 689).

China's global reputation was also badly hurt from the political and rhetorical actions associated with the sanctions following the Tiananmen Square Incident. *Moral persuasion* represents soft, normative human rights forces to stigmatise the wrongdoer. As a tactic to redefine the interest and identity of target states (Risse, 1999), it was employed by organizations and governments to pressure China into conformity with international human rights standards. For instance, the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the United Nations adopted a resolution 1989/5 to discuss the 'situation in China' (Commission on Human Rights, 1990). Governments employed a wide range of measures, including suspension of high-level contacts with the Chinese government

¹¹⁶ Chinese political leaders stated that China could survive the sanctions and were not afraid of paying the price of being sanctioned. Deng Xiaoping commented on foreign economic sanctions in 1990: '[E]xperience has proved that China has the ability to withstand these sanctions...China's development ...has proceeded under international sanctions for most of the forty years since the founding of the People's Republic...we're good at withstanding sanctions.' See (Deng, 1990)

and moral consciousness raising in the forms of issuing condemnations through diplomatic channels, etc. to put pressure on China.

Rhetorical condemnations as such sent a strong warning message to the Chinese leadership that the international community would extract a high price if they engaged in serious human rights violations (Seymour, 1990: 4). However, merely denouncing China's political legitimacy does not constitute a genuine dialogue with the Chinese government. In fact, it can easily raise hostility and distrust. Meanwhile, skilful pragmatic diplomats and politicians in China were not only at the receiving end of international human rights influences – they were able to manoeuvre human rights forces. The Chinese government responded almost immediately with a counterargument that imposing sanctions on China was an unjustified interference with China's internal affairs. Additionally, enraged by France's tough-line responses after the Incident and particularly the fact that Paris became a bastion of overseas Chinese dissents (Seymour, 1990: 7), the Chinese government placed a moratorium on its economic links with French businesses. To mollify the Chinese government, the French government issued a warning to pro-democracy activists not to engage in political activities aimed at Beijing although continued to provide protection to the activists in private.¹¹⁷

As the Chinese government took a hard-line position in spite of all the sanctions, the international pressure gradually abated. In fact, EU-level institutions found it difficult to muster a collective front as a division appeared among its member states, driven

¹¹⁷ In particular, two large projects are affected: a proposed French commercial centre in Beijing and a \$460 million joint venture to develop Hainan Island. (Seymour, 1990: footnote 20, page 7)

by individual states' motives and interests. Some members of the EU were concerned that criticizing and punishing the Chinese government would possibly derail their relations with Beijing in the long run (Youngs, 2001; Baker, 2002: 49-50; Casarini, 2006) . The Twelve began to fall apart quite quickly as 'all the States were not on exactly the same wavelength as regards the measures to be taken against China'¹¹⁸. On 4 July, only one month after the Incident, EC foreign ministers announced their intention to re-establish political contacts with China.

On 28 September, the foreign ministers of Italy, Ireland and Luxembourg met with the-then foreign minister Qian Qichen on the fringe of the UN General Assembly. 'To strengthen the ties between the EC and China is of great importance to world peace and stability' (Möller, 2002: 17), Italy frequently lobbied other EU members states to relax sanctions. In September 1990, it was alleged that the UK had violated the embargo by issuing permits to GEC Marconi to sell radar equipment for fighter planes (European University Institute and Institut für Europäische Politik, 1990: 322). And by 22 October 1990, EC foreign ministers had decided to resume economic cooperation and to re-establish high level contacts with China because of China's support of the Western countries' stand on the Iraqi incident.¹¹⁹ The European alliance to bring pressure to bear on China had officially fallen through.

Beijing's responses in the aftermath of the Incident show that it has learnt to resist and manipulate international pressures by using its economic and political strength.

¹¹⁸ A statement of Madame Cresson in response to a question in the European Parliament in September 1989. (Baker, 2002)

¹¹⁹ Quotation of the then French Foreign Minister Roland Dumas. (Feege, 1992; Möller, 2002; Gosset, 2002)

With the inherent weakness of the socialization mechanisms of international human rights forces, outright military and economic sanctions proved to be of limited effect in transforming China's behaviour and attitudes towards human rights in this case. However, endeavours to induce China to align its human rights practices with international human rights standards through providing economic benefits in this period seemed to bear fruits. A well-known example of the 'carrots and sticks' *coercive* approach was the pressure put on China by the United States through the annual renewal of China's Most Favoured Nation (MFN) trading status.

Since the late 1970s, American political leaders cultivated a human rights-focus diplomatic relationship with China. Jimmy Carter, who rose to Presidency with a human rights prioritized political agenda, was followed by the anti-communist Ronald Reagan who served two consecutive terms. The dynamics of American politics, as well as China's vested interest in the Sino-US trading partnership, gave further impetus to the attention of US on China's human rights. China's MFN status was renewed on a yearly basis, conditional on China's compliance with human rights conditions in the 1990s (Burkhalter, 1991). This mechanism is an example of the United States using economic benefits to induce China's compliance with international human rights standards. It remained effective until China's permanent normal trade relations (PNTR) with the US were eventually established.

Also during this period, the United States used its economic power and influences in the international community to successfully promote improvements of China's human rights conditions. In late April 1990, Prime Minister Li Peng announced the lifting of martial law in a nationally televised speech, and within hours the United

States announced that it was easing its blanket opposition to World Bank loans to China (Pear, 1990). Later, on 10 May, Beijing announced the release of 211 political dissents (Friedman, 1990). These gestures from the Chinese government indicated the willingness of the Chinese government to cooperate with foreign forces to improve its human rights conditions when there are strong economic incentives.

Slow progress was still underway as China further opened itself up to dialogue and international scrutiny. The first signal of this attitude change in the post-Tiananmen era came from academic elites, i.e. scholars and experts. To fight off international accusations of China's human rights violations, the Propaganda Department of the Central Committee of the CPC held two high-level expert forums respectively in 1990 and 1991. Most participants attending the forums, although instructed to criticize and repudiate the concept of *western* human rights and to advise on coping strategies for China to defend its human rights policies in front of the international community, nevertheless voiced their support for the idea of human rights. Academic elites expressed the view that it was time for the Chinese government to enhance human rights protections for its citizens (Guo, 2011a).

At that time, cold-war ideological confrontations between capitalist and communist camps began to fade away and China had already turned to a market capitalist economy.¹²⁰ The taboo on human rights, that is, associating the concept of human

¹²⁰ Under Deng Xiaoping's 'to get rich is glorious' economic policy, economic growth was put on the top of China's reform agenda in the late 1970s. To secure this goal, the primary task for China in the 1990s continued to be fostering an open market, engaging itself closely with the international community, getting the entry clearance to join various international institutions, restoring its connections with other states and organizations which were severed during Mao's years.

rights with capitalism and calling it 'capitalistic human rights', gradually melted down. This rise of domestic awareness to respect rights and dignity of criminal offenders inspired by the legal modernization and reform, may also have contributed to the change of human rights attitudes in China.

Attitudinal Change towards Embracing Human Rights in the Past Three Decades

Since the mid-1990s, China's human rights practices and conditions were further opened up for debate discussion in the mainstream political and academic discourses. 'Human Rights in China', the first in a series of Chinese human rights White Papers, was published by the State Council Information Office in 1991. This government document disassociated the concept of human rights with capitalism and called it 'a great concept', an 'ultimate goal of the Chinese socialism' and a 'long-term mission of the Chinese People and the Chinese government' (The Information Office of the State Council, 1991b). The lifting up of the long-time taboo on human rights in theory was followed by a booming tide of domestic research on human rights. The China Society for Human Rights Studies, the first academic society conducting research on human rights, was established in 1993.

By 1997, the Central Committee of the CCP announced that one of its tasks was to 'respect and protect the human rights' (Jiang Zemin, 1997). When meeting U.S. President Clinton, President Jiang Zemin acknowledged that 'the Chinese government promised solemnly to promote and protect human rights and basic freedoms' (Feng, 1998: 495). By 1999, Jiang Zemin stated that China respects the universality of human rights and welcomes dialogues and cooperation on human

rights on the basis of equality and mutual respect (Editor, 1999). This stands in stark contrast with his post-Tiananmen comment in 1990 that human rights as a propaganda tool of China's Western enemies.

China's accession into the WTO in this era illustrates how both financial drivers and argumentative negotiations motivated China's gradual embrace of human rights. Among other reasons, the fact that China had risen to the position of an important world trade partner made it in urgent need of joining the GATT/WTO towards the end of the 20th century. China engaged countless bilateral and multilateral bargains with various countries, many of whom were not satisfied with its poor human rights record during the 1990s¹²¹. Due to this motivation, China conducted extensive domestic legal restructuring under the requirements of the WTO accession protocol (Ostry, 1998: 11-18; Man, 1997). Topics on China's human rights conditions were discussed and debated on occasions of bilateral or multi-lateral human rights summits, dialogues, conferences and meetings between foreign states and the Chinese government. As a softer and the most common approach to elicit internal acceptance of human rights norms through argument, the mechanisms of *persuasion* (Goodman and Jinks, 2004; Risse and Sikkink, 1999; Hawkins, 2004) has been readily seen.

¹²¹ The NPC approved China's application for the GATT membership in 1982. In 2001, China finally became a member of the WTO.

A landmark event indicating the progress was that the term ‘human rights’ was written into the Chinese Constitution in 2004.¹²² Although the Chinese Constitution is considered of merely rhetorical importance, this incorporation of ‘human rights’ into the theoretically ‘supreme law’ in China was nevertheless a strong signal of attitudinal shift as regards to human rights. Recent years saw Chinese political leaders announcing their support for human rights on various occasions. For instance, delivering a speech at Yale University in 2006, President Hu Jintao remarked that ‘we shall...ensure that people will enjoy freedom, democracy and human rights...so that the 1.3 billion Chinese people will live their happy lives.’ Premier Wen Jiabao, in a rare political move, published an article in the *People’s Daily*, in which he stated that ‘science, democracy, the rule of law, freedom, and human rights are not owned exclusively by capitalists, but are common values and achievements of civilisations shared by all mankind.’ (Wen, 2008)

Most recently, the first-ever National Human Rights Action Plan of China (2009-2010) announced: ‘China will continue to fulfil its obligations to the international human rights conventions to which it has acceded, and initiate and actively participate in exchanges and cooperation in the field of international human rights.’ (The Information Office of the State Council, 2009) Though China is yet to develop concrete mechanisms and institutions, the language of the Action Plan shows China’s intention of taking human rights protection seriously, at least in front of an international audience.

¹²² The Constitution was amended on March 14, 2004 to include guarantees regarding private property (‘legally obtained private property of the citizens shall not be violated’) and human rights (‘the State respects and protects human rights’). See Article 33 of the Constitution of the People’s Republic of China (adopted on December 4, 1982)

However, it is worth noting that despite China's substantial attitudinal change, human rights remain a politically sensitive topic. The first government White Paper, 'human rights in China', stated that 'China firmly opposed to any country making use of the issue of human rights to sell its own *values, ideology, political standards and mode of development*, and to any country interfering in the internal affairs of other countries on the pretext of human rights...and so hurting the *sovereignty and dignity* of many developing countries' (The Information Office of the State Council, 1991a). Similar arguments emphasizing China's sovereignty and peculiarity are still widely used by Chinese politicians, diplomats and legal elites alike.

Moreover, China, with its growing economic, diplomatic and political weight in international affairs and new 'skilled pragmatic' diplomatic policy, may have become less deferential to international pressure, just as the US is, in recent years. An example of its increasingly aggressive diplomatic initiative to retaliate against states that are critical of China's human rights conditions is its short-term cancellation of the EU-China summit in Lyon in 2008. The summit was intended to focus on disputes linked to China's huge trade surplus with the EU and on coordinating international action to counter the global economic crisis. This is the first time that China called off the summit in eleven years. Apparently this diplomatic gesture was intended to thwart French President Sarkozy, whose alleged contemplation of boycotting the Olympics and support for pro-Tibetan demonstrators was interpreted as offending of the Chinese leadership (Traynor, 2008).

A similar example of China's increasing capacity to engage in political manoeuvre and manipulation was its 'salmon diplomacy' to Norway. In 2010, China warned the Norwegian government about the possible 'negative impact' on the China-Norway relationship if the Norwegian government supported the Nobel Committee's nomination to grant the Nobel Peace Prize to imprisoned Chinese political dissident Liu Xiaobo. Six months after the award ceremony in December 2010, Norwegian salmon exporters finally tasted China's revenge-their exported fish was being held up for days or even weeks by Chinese food safety inspectors. Apart from the financial loss of salmon farmers, other aspects of Norway's exportation business, including those of oil, metals and chemicals, were all denied access to the fast-growing Chinese market. Norway-China political contacts were put on hold: Shortly after the 8 October Nobel announcement, China called off meetings with a Norwegian Cabinet minister visiting the World Expo in Shanghai, while the Chinese ambassador to Oslo went on vacation for more than two months; the Norway-China free-trade negotiations were set aside because China 'needs more time for consultation'. Needless to say, Oslo felt the pressure coming from frustrated business lobbyists urging it to make some concessions toward Beijing (Amland, 2011; Zuo, 2010).

In sum, along with domestic drivers, China's official attitudes on human rights have changed significantly since the late 1970s under the influences of international human rights mechanisms such as coercion and persuasion. Some of China's policy adjustments were small but concrete; some remain a combination of concession in formality and resistance in substance. Yet with strong state control of the public media, China's human rights policies remain a major issue of its foreign policy and of strong political sensitivity. The fact that Google was forced to pull out of the

Chinese market due to its disagreement with the Chinese government on censorship in 2010 is proof of such sensitivity and the increasing capacity of China to employ countermeasures to fend off external pressures. As Eriksen puts it, 'as long as human rights are not properly institutionalized but exist merely as moral rights, they can be used at will.' (Eriksen, 2006: 253)

*Section Two. The Impact of International Human Rights Dynamic on China's
Death Penalty Practices and Discourses*

As a topic high on the human rights agenda, discourses on China's death penalty opened up new terrain for academic enquiry at the turn of the century.¹²³ Since then, incremental attitudinal changes have been gradually institutionalized during the past decade by a series of specific and concrete reform initiatives. Similar to the transformation of attitudinal changes in the field of human rights, the Chinese government's policies and attitudes on capital punishment towards humanization and civilization has been significantly influenced by international influences – mainly pressures and criticisms appealing for China to abolish and restrain its use of capital punishment.

Specifically, the recent movement towards restriction of the application of the death penalty in China has been a product of the 'glocalization' (Robertson, 1992) process, i.e. China's adapting of European penal sensibilities and norms to local conditions.

¹²³ According to Professor Roger Hood, the Sino-EU discourses on capital punishment started around 1999. (Hood, 2009: 7)

In the field of international human rights law, in order to foster a target state's compliance with international norms and standards, the global force can adopt various mechanisms ranging from coercion to persuasion to acculturation (Goodman and Jinks, 2004: 630-633; Patterson, 2006). China's rise to the status of a prominent member in international politics and the changing power dynamics between China and Europe in recent years made outright coercion less viable as a means of influencing capital punishment practices in China. Central to the translocal exchanges of capital punishment law, ideologies and practices between China and the 'European community of sentiment' (Girling, 2005; Girling, 2006) were the mechanisms of persuasion and acculturation.

An Overview of the Transformation of Attitudes and Practices on Capital Punishment in China

Over the course of China's contemporary criminal justice history, capital punishment norms, policies and attitudes have gone through fundamental changes. Under the rule of Mao Zedong, capital punishment machinery in China during the chaotic era of political campaigns—fraught with errors and uncertainties—was particularly appalling. A report issued in 1980 by the SPC admitted that miscarriages of justice were so prevalent during China's decade-long Cultural Revolution (1966-1976) that an estimated 17.5 to 39 per cent of capital convictions were found to be wrongful in various provinces across China.¹²⁴ Significant progress in the post-Mao era has been

¹²⁴ The SPC, 'The Report on Some Opinions for Reviewing and Correcting Wrongfully Convicted Capital Cases during the Culture Revolution' (22 September 1980). This official report issued by the highest court

made, along with the socio-economic developments launched towards the end of the 1970s. The Criminal Law of 1979, the first criminal code in China's penal history, eliminated 'counter-revolutionary' offences from the list of capital offences in criminal law. Apart from this depoliticization of criminal conduct, vulnerable groups including juveniles were no longer punishable by immediate execution under the 1979 statute, but still eligible for a suspended death penalty.

Despite the rapid growth of capital offences in law via promulgation of judicial interpretations and special ordinances, and the gradual delegation of the SPC's review power to Provincial High Courts¹²⁵ throughout the 1980s and 1990s, the 1997 Criminal Law—the second and present existing penal code—stipulated that the power to review death sentences belonged only to the SPC and it excluded pregnant women and juvenile offenders from both suspended death sentences and immediate execution. The greater protection afforded to vulnerable groups and insistence on procedural due process in the 1997 Criminal Law, at a time when Strike Hard Campaigns were still dominating the Chinese penal regime, shows the positive influences of scholars and legislators in promoting China's march towards the rule of law and human rights (Liu, 2004).

According to Professor Roger Hood, a renowned scholar on the global process of capital punishment abolition, the discourses on capital punishment between China

in China revealed that a total of 223,921 people were sentenced to death during the Cultural Revolution, in which 10,402 were sentenced to counterrevolutionary offenses and 13,519 were sentenced to ordinary (non-political) offenses. 47 wrongful executions took place in Beijing, which account for 17.5% of the total numbers of executions. Whereas in Ningxia (a north-western province), 70 people were wrongfully executed, which account for 39% of all executions.

¹²⁵ According to the Organic Law of the People's Courts of the People's Republic of China, the HPCs are responsible for the adjudication of cases at the provincial level.

and Europe-led worldwide campaign against the death penalty started around the end of the 1990s (Hood, 2009: 7). This was exactly when China's institutional reform began to gain momentum, with a series of elite-led reforms of capital punishment outlined in the first Five-Year Reform Plan of the People's Courts (1999-2003). Among other initiatives, the review power over capital cases was returned to the SPC in 2007 from the HPCs; appellant trials were held in open courts instead of in secrecy from 2006; a legislative leap to remove 13 capital offences from the Criminal Law was taken in 2010; the aged (above the age of 75) were no longer punishable by death in principle; most of the executions are now carried out through lethal injections instead of shooting. The reforms have institutionalized the transformation of the discourse on capital punishment at a remarkable pace.

There have been two visible trends in these recent transitions in capital punishment law and practices. The first involves qualitative changes to the administration of capital punishment towards more civilized and humane practices in various ways. The on-going shift from bullets to needles and the strong attempts to eliminate shaming parades from the local practices are cases in point. The second is a quantitative change in the recourse to death sentences and executions. Although no official statistical proof has been forthcoming, as these figures remain cloaked by state secrecy law, it has been claimed that since the review power was recalled by the SPC in 2007, half of the defendants who would previously have been executed instead received a death sentence with a two-year reprieve, of which 99% would

never be executed.¹²⁶ This quantitative reduction in the use of capital punishment is perhaps the most significant development in the moderation of capital punishment machinery in China.

From that time the EU has been engaged with China in regular wide-ranging dialogues, seminars and projects¹²⁷ to create, develop, and then transform discourses leading to restriction and eventual abolition of the death penalty (Hood, 2009: 1-5; Manners, 2002: 248). China's attitudes towards human rights rationales that underpin the anti-capital punishment activisms have undergone a change from considering these subjects as alien topics against the grain of Chinese orthodox ideology and culture, to conditionally accepting them into mainstream penal discourse. China's official policy on capital punishment has also shifted from a strike-hard style infliction of the death penalty without restraint to a commitment to 'kill fewer, kill carefully' and 'tempering justice with mercy'.¹²⁸ It is significant that China signed the ICCPR in 1998, and although it has yet to ratify this treaty it has, at various times, claimed—although not in a way to convince its critics—that its policy is in conformity with the demands of that treaty as regards the use of the death penalty.

¹²⁶ This quotation is from an interview given by Liu Hainian, a researcher at the Chinese Academy of Social Sciences. (Wu, 2009)

¹²⁷ Specific recommendations generated from these forums included recommending China to limit its use of the death penalty include lifting the secrecy on death penalty statistics, narrowing the scope of capital offences, improving judicial procedure for capital cases, granting of clemency and amnesty to condemned prisoners, etc.

¹²⁸ In February 2010, the Supreme People's Court has issued 'Several Opinions on Implementing the Penal Policy of Tempering Justice with Mercy', in which the SPC pronounced and stressed that the use of the death penalty must be restricted and cautiously applied, instructing lower courts to limit its use to a small number of 'extremely serious' cases. (Reporter, 2010b; Wee and Mao)

Today, the debate between China and the global community against the death penalty has come to centre on *how*, not *whether*, to restrict the death penalty with the final goal of abolition. Attitudinal changes among elites have subsequently been institutionalized by a series of reform initiatives. Along with a domestic impetus, the author argues that the Chinese government's position on capital punishment has been motivated by external drivers, mainly pressures and criticisms appealing for China to abolish and restrain its use of capital punishment. The European Union (hereinafter the EU), international organizations such as the United Nations, and non-governmental organizations (NGOs) such as Amnesty International, Hands Off Cain, and the Great Britain-China Centre, among others, have played a leading role in first initiating and then stimulating anti-capital-punishment discourses and sentiments in China.

Along with China's domestic pressures against miscarriages of justice, international impetus has generated non-trivial consequences over a decade - discourses on capital punishment have 'in many ways been transformed' (Hood, 2009: 3). The former defensiveness on the subject has largely evaporated and the debate has come to centre on how to restrict the death penalty with the final goal of abolition. Today, 'no one can doubt that a movement towards restriction and eventual abolition has got under way' as Chinese scholars and elites are increasingly willing to discuss the death penalty in human rights seminars and EU-China dialogues (Hood, 2009: 5).

It is not difficult to discern the attitudinal changes by examining the speeches of various Chinese spokespersons in the United Nations over time. The United Nations serves as an important platform for the international community to monitor and

exert pressures on countries still actively inflicting the death penalty around the world, including China. In November 1994, when Mr Li Baodong spoke before the Third Committee of the 49th session of the U.N. General Assembly, he said that ‘the abolition of capital punishment was an internal matter to be decided by states; it was therefore unrealistic to request all countries to abolish it’¹²⁹. This emphasis on territorial sovereignty over the matter of capital punishment and refusal to envisage the possibility of abolishing the use of capital punishment in China changed fundamentally 13 years later.

In March 2007, during a high-level segment of the UN Human Rights Council, the head of the Chinese delegation stated, ‘we are seeking to limit the application of the death penalty in China. I am confident that with the development and the progress in my country, the application of the death penalty will be further reduced and it will be finally abolished.’ (Human Rights Committee, 2007) This announcement has been extensively cited by activists and scholars not only as a signal of the Chinese government’s willingness to moderate considerably its previous active use of the death penalty, but to embrace eventually the goal of the abolitionist movement.

Furthermore, at the General Assembly of the United Nations, resolutions were carried in 2007, 2008, 2010 and 2012 by a majority of voting member states calling for a Moratorium on the Use of the Death Penalty¹³⁰. Although not legally binding,

¹²⁹ U.N.Doc. A/C.3/49/SR.36, paragraph 44.

¹³⁰ See UN General Assembly resolutions 62/149 (2007), 63/168 (2008), 65/206 (2010). On November 19, 2012, the United Nations Third Committee – the Social, Humanitarian Cultural Affairs Committee – voted in favour of a resolution for a moratorium on capital punishment by a vote of 110 for, 39 against, and 36 abstaining. (UN News Centre, 2012)

these resolutions carry significant moral and political weight. China voted against all these resolutions and in doing so questioned this periodical ritual of the UN, but it was nevertheless drawn into debates, discussions and deliberation on the suspension of capital punishment. For instance, in 2007, China objected to the pressures from abolitionists but indicated its preference to discuss the use of capital punishment with other parties via bilateral or multilateral dialogues (Sixty-second General Assembly Plenary, 2007). While casting a negative vote on the most recent draft resolution calling on States to establish a moratorium on executions – A/C.3/67/L.44/Rev.1 – China nevertheless admitted that it is crucial ‘to exercise the strictest caution in the practice of the death penalty’.¹³¹

Europe's self-perceived identity as a normative promoter of human rights values has found a profound expression in its international pursuit of abolition of the death penalty (Manners, 2002). Indeed, the worldwide anti-death penalty campaign led by the Council of Europe, the EU, member states of Europe, and European-based NGOs, has become a central part of European foreign policy (Girling, 2005). Based on its cosmopolitan view that the death penalty is a fundamental violation of basic human rights, specifically the right to life and the right to be free from cruel, inhumane, and degrading punishment or treatment (Hood and Hoyle, 2009: 6-8 and 18-20; Hood, 2009: 7; Manners, 2002: 246), Europe's campaigns against the death penalty have extended beyond its continental border to all retentionist nations,

¹³¹ This draft resolution was approved by the Third Committee of the General Assembly. (Department of Public Information) China went further than voting against these resolutions by signing the NOTE VERBALE of dissent to the resolutions of 2007, 2008 and 2010.

including Asia, the 'next frontier' (Johnson and Zimring, 2009) of global abolition movement (Hood, 2012).

Europe has sought to promote changes in China mainly through mechanisms of persuasion and dialogue. EU-level institutions have endorsed high-level bilateral ministerial activities between the European representatives and the Chinese Ministry of Foreign Affairs, as well as coordinated academic projects and programs between European and Chinese partners.¹³² Political elites, academics, judicial elites, legislators and law-enforcement officials from both sides have been actively involved in these activities. The Council of Europe, the EU and its member states also appeal for China to stop imposing the death penalty on and executing defendants who are European nationals on a case to case basis. The highly publicized execution of Akmal Shaikh, a British citizen, is a case in point which will be discussed later in this chapter.

Apart from the efforts made by institutions in Europe and the United Nations, scholars, Amnesty International and other NGOs have done remarkable work in keeping a close eye on various aspects of the administration of capital punishment in China. Collecting statistics about the worldwide administration of capital punishment has been a crucial device because it induced changes in states still actively practicing capital punishment by informing them about the positions of other

¹³² For example, the Great Britain-China Centre has worked with Chinese partners since 2003 on projects on capital punishment such as 'Strengthening Defence in Death Penalty Cases' (2003-2006), 'Moving the Debate Forward: China's Use of the Death Penalty' (2007-2009), 'The Power of Evidence' (2011), 'Promoting Judicial Discretion in The Reduction and Restriction of the Application of the Death Penalty' (2009-2011).

countries on capital punishment policies and by forcing them to accept their status as 'rogue states' in the international community. For example, compiling data on the widespread and growing acceptance by most nations that article 6(2) of the ICCPR (which states that capital punishment can only be imposed, pending abolition, for 'the most serious offences'), should be interpreted in a very restrictive way to encompass only crimes that intentionally result in lethal or other particularly grave consequences, provided China with a strong incentive to remove non-violent crimes from its list of capital crimes. Exposure of China's practice in the field of capital punishment in the global media discourse has forced China to re-consider whether it should insist on its excessive capital punishment policies and whether such policies comport with China's self-perceived identity as a 'civilized nation' and a 'responsible member of the global community'.

Resistance to, Justifications and Setbacks of Chinese Capital Punishment Reforms

Although it is fair to say that there has been a visible shift in China's attitudes and practice regarding capital punishment and human rights, the Chinese authorities still consider capital punishment as an essential instrument of domestic criminal justice. To date, there remains widespread support for the death penalty among political and legal elites, as well as among the general public, especially for murder and possibly for corruption.¹³³ Furthermore, there are still considerable gaps between the Chinese

¹³³ A recent public opinion survey was conducted by the Penal Law Research Centre of the Wuhan University and Max Planck Institute for Foreign and International Criminal Law in 2007-2008. The author notices that the findings of this most recent survey of public opinion did not suggest that there is high public support for the death penalty for corrupt officials. (Oberwittler and Qi, 2009)

practice and international standards as set out in the ICCPR and the United Nations Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty (United Nations Economic and Social Council, 1984). The three most commonly used counter-arguments against abolitionist movements, which are repeatedly used by the mainstream media and government representatives in China to justify China's existing capital punishment institutions and policies, are as follows.

The first rationale is to deny that international human rights standards and norms concerning capital punishment are universally applicable to all countries, despite the fact that China has signed the ICCPR. The Chinese government has argued that China has special national circumstances and therefore should not be subject to international human rights norms and standards that are rooted in the culture and social structures of Western countries. Various spokespersons of the Chinese government have labelled the arguments and initiatives launched by countries promoting worldwide campaign against the death penalty as political interference in China's capital punishment policies and practices under the cloak of promoting universal values of human rights.

A second, related, justification for retaining the death penalty is based on the argument that capital punishment is, in any event, a matter within the domain of domestic criminal justice policy. Thus, requiring sovereign states to abolish capital punishment represents an outright invasion of their sovereignty and internal affairs. This nationalist argument has been supported by pro-death-penalty scholars (Chen, 2005b; Tian, 2005; Liang, 2004) as well as government officials. For example, Madame Zhang Dan, Counsellor of the Chinese Mission at the UN General

Assembly, stated that attempts to achieve a universal moratorium on capital punishment at the UN General Assembly was an intrusion into the internal affairs of a sovereign state.¹³⁴ Further, this position insists that the issue of the death penalty is a matter of domestic administration of criminal justice, rather than an issue of human rights. This argument, reinforced by mainstream media and other propaganda tools in China, has become a justification widely accepted by the general public.

Third, it has also been frequently maintained by Chinese government officials that there is no consensus worldwide that capital punishment is in breach of universal human rights, in part because article 6(2) of the ICCPR still allows its limited use, but mainly because quite a few countries and some regions have not abolished the death penalty, including democratic states such as the US and Japan. Given that these democratic societies that highly value democracy and the rule of law have retained the death penalty, it seems unreasonable to criticize China's retention of capital punishment, especially as it has now set on the path to reform its death penalty administration in order to use capital punishment in a strict and cautious manner.

Other justifications include the claim that the death penalty is a greater deterrent than other forms of punishment in China (the most severe form of these lesser penalties being a suspended death sentence). It is widely said in China that 'killing one can deter one hundred', i.e. punishing a few of the most outrageous wrong-doers with death can most effectively prevent others from committing crimes. In addition, it is

¹³⁴ Summary Record of the 45th Meeting: 3rd Committee, Held at Headquarters, New York, On Thursday, 11 November 2010, General Assembly, 65th Session, A/C.3/65/SR.45, 12 January 2011.

also believed that executing a handful of heinous criminals is actually respectful of the 'human rights' of the majority of the people, including victims and the families of victims (Xu, 2005). Last but not least, it is commonly asserted that the general public has a blind faith in capital punishment in China. The Chinese authorities insist that resorting to the death penalty is necessary to appease growing public anger in highly publicized cases involving murder and other grave crimes.

This mind-set that insists on retaining the *status quo*, has led occasionally to backlashes against progressive reforms. Despite the movement towards greater leniency and restraint in China's capital punishment policy, just at a time when China observers believed the notorious 'Strike Hard' Campaign had faded into the Chinese criminal justice history, this practice found its way back. The most recent 'Strike Hard' Campaign in 2010 was a setback for China's movement towards the reduced use of harsh punishment and indicates the complexity and difficulty of promoting changes toward penal moderation in a country where punitive policies and mentalities continue to dominate the political and legal circles.

Domestic and international critics expressed great concerns over possible wrongful convictions and abuses of criminal procedure during this new round of a national campaign (Congressional-Executive Commission on China, 2010). Statistics show that during the 'Fight against Evil Forces' in 2010, a specific theme under the general Strike Hard Campaign, 1,802 (45%) of the 3,989 offenders convicted of involvement in organized crime were sentenced to fixed-term imprisonment above five years, life imprisonment, suspended death and death, although the specific number of death sentences and executions remains unknown. The media nationwide were once again

flooded with news and photographs of sentencing rallies and parades aimed to shame offenders in various provinces¹³⁵ during the high tide of this round of Strike Hard Campaign (Zhu, 2010).

Nevertheless, this latest strike hard campaign was milder and narrower in scope than the previous three rounds in 1983, 1996 and 2001. The old practices of convicting and executing a prisoner within only a few days of arrest¹³⁶ has gradually disappeared during the recent capital punishment reform era, particularly due to fundamentally changed institutional arrangements and practices in the field of capital punishment. Moreover, even during the climax of this new round of Strike Hard Campaign, authorities sent down guidelines for ‘tempering justice with mercy’. In addition, in the same year (2010), the first draft of the Eighth Amendment to the Criminal Law (Eighth Amendment) – which proposed to abolish 13 capital offences – was submitted to the NPC and finally approved in 2011.

Section Three. Evaluating the Impact of International Pressures on Chinese Capital Punishment Practices: Case Studies

This section of this chapter discusses the impact of international influences based on two case scenarios—the drawn-out process of prohibiting the local-level practices of

¹³⁵ According to online news reports, various cities and counties of at least nine provinces, including but not limited to Hunan, Yunan, Hubei, Jiangsu, Guangdong, Shangxi, Guizhou, Guangxi, Sichuan, held such publicized sentencing rallies in 2010.

¹³⁶ Amnesty International reported a case that began with three men allegedly stealing a car filled with banknotes on May 21. On May 24, they were arrested; on May 27 they were sentenced to death; On May 28 their appeal was rejected; on May 31 they were executed. In another case a man was executed for murder six days after he committed the crime. (Hays, 2012)

shaming parades in China; the failed efforts of anti-death penalty activists abroad to save Akmal Shaikh from execution¹³⁷. The aim is to further evaluate the impact of worldwide campaign against the death penalty on capital punishment practices in China, as well as to explore the influences of domestic political manoeuvres on the processes of policy developments relating to capital punishment.

Banning the Rituals of Pre-execution Shaming Parades

Public shaming has long been regarded as instrumental for the administration of capital punishment in China at the local level due to at least two reasons. First, culture comes into the play because in China, the concept of face (*mianzi*) is a highly-valued cultural symbol associated with authority, personality, status, dignity, honour and prestige of a person and losing one's face will substantially affect the functioning of the person's social life (Hwang, 1987: 960-962; Ho, 1976). Therefore, shaming the prisoner in front of the public was meant to convey a powerful warning message of retribution and moral blameworthiness to the public. It was also regarded as a powerful deterrent signal to members of society of the consequent loss of 'face' if they dared to commit wrongdoings.

Secondly, public shaming was of symbolic significance to demonstrate state power to maintain tight social-control and spread ideological propaganda. At public spectacles of shaming parades, the strength of political power, the harshness of criminal punishment, and the power of public indignation were merged together to create a

¹³⁷ For a briefer discussion of these two cases, please also see (Miao, forthcoming 2013)

theatre of justice ‘drama’.¹³⁸ During these occasions, the public was regularly mobilized to side with the state and made to believe that harsh punishments inflicted on the rule-breakers were in their best interests. They – rather than the authorities – were the guardians of government-made rules. In essence, the public administration of capital punishment is a populist ritual that not only confirmed, but also reinforced the political legitimacy of the local government.

Nevertheless, various Chinese political-legal authorities at the national level jointly issued a series of directives to local law enforcement departments and judicial authorities, banning the rituals of public parading convicted prisoners respectively in the years 1984¹³⁹, 1986¹⁴⁰, 1988¹⁴¹, 1990¹⁴², 2007 and 2010. The directives issued in the 1980s and 1990s were mainly responses to foreign media coverage of these practices. They would normally state in the opening paragraph that foreign media had made false accusations about China’s administration of justice and suggest that, as a coping strategy against foreign criticisms, local authorities must prevent disclosure of any relevant information. Unlike announcements by the Chinese government meant for an international audience, these ‘internal’ directives, issued by the central authorities to instruct local authorities on issues concerning capital punishment, reflect the genuine intentions and concerns of the Chinese government.

¹³⁸ Susan Trevaskes has provided an excellent account of the symbolic meanings conveyed in these sentencing rallies. (Trevaskes, 2003)

¹³⁹ The Propaganda Bureau of the Central Committee, the SPC, the Ministry of Public Security, and the Ministry of Justice, ‘Notice on Preventing Hostile Media Reports Uttering Slandorous Statements on Our Executions of Condemned Prisoners’ (21 November 1984)

¹⁴⁰ The SPC, the SPP, the Ministry of Public Security, and the Ministry of Justice, ‘A Notice on Prohibition of Parading the Prisoners through Streets in front of the Public’ (24 July 1986).

¹⁴¹ The SPC, the SPP, and the Ministry of Public Security, ‘The Notice on Firmly Restraining Parading Convicted and Unconvicted Prisoners through Streets in front of the Public’ (1 June 1988).

¹⁴² In 1990, the SPC, the SPP, and the Ministry of Public Security issued the Notice on Strictly Control Interviewing and Taking Photos at Execution Sites (the 1990 Notice).

These directives indicate that over the past three decades, concerns over loss of China's reputation and damage to China's image were of primary concern to the party-state, along with domestic motivators. These legal documents proved that in contrast with the tendency of U.S. political and legal authorities to turn a deaf ear to international criticism of its use of capital punishment¹⁴³, the Chinese government has been sensitive, or even vulnerable, to international influences. Yet the fact that the instructions demanded local authorities in China to cover up information and spectacles of capital punishment administration, serves as proof to show that besides fostering positive changes towards embracing human rights, strong external pressure could also force the State to fold in secrecy those practices that were targets of the shaming strategy.

As a matter of fact, as the pressure generated by international criticisms grew over the years, the Chinese government created a thicker veil of secrecy over its practices. For example, by 1990, central authorities instructed in the directive that all domestic media reports on executions must be approved by the HPCs so that these materials would not fall into the hands of the public and anyone outside of mainland China.¹⁴⁴ This secrecy about the way China implements capital punishment and the number of people annually executed has become a huge impediment for further reforms today.

¹⁴³ This tendency has been characterized as the 'American exceptionalism'. (Koh, 2003: 1482; Ignatieff, 2005; Garland, 2005: 347; Steiker, 2002)

¹⁴⁴ The SPC, the SPP, and the Ministry of Public Security, 'The Notice on Strictly Control Interviewing and Taking Photos at Execution Sites' (16 July 1990).

On the other hand, over the years, the reasons why central government has sought to ban public sentencing rallies and shaming parades have changed. For instance, the 1988 Notice, for the first time, mentioned *domestic* concerns as one of the rationales against shaming parades. This was a sign that domestic objection to such practice may have emerged. Later on, concern for the dignity of the defendant was also included. A 2007 Notice said that ‘parading (the condemned prisoners) through streets in front of the public is forbidden because such practices *humiliates* those who are about to be executed’.¹⁴⁵ And a more recent (2010) Notice forbade parading prostitutes through streets in public¹⁴⁶ because such practices *humiliate* women¹⁴⁷.

The fact that shaming parades and sentencing rallies have been gradually fading out of the criminal justice theatre in China was not the only indicator of change in the rituals and culture of executions. Apart from the largely successful attempts to abolish public shaming parades before executions, capital punishment culture today in China has been transformed into a situation whereby more than half of the provinces have adopted lethal injection and abandoned the practice of execution by

¹⁴⁵ Article 48, Notice of the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security and the Ministry of Justice on Issuing the ‘Opinions on Strengthening Handling Cases in Strict Accordance with Law and Guaranteeing the Quality of Handling Death Penalty Cases’ (09 March 2007) <http://news.xinhuanet.com/legal/2007-03/12/content_5833204.htm> (in Chinese) accessed 08 September 2011.

¹⁴⁶ Andrew Jacobs, ‘China Pushes to End Public Shaming’ (*The New York Times*, 27 July 2010) <<http://www.nytimes.com/2010/07/28/world/asia/28china.html>> accessed 20 August 2011; The Ministry of Public Security, the Ministry of Human Resources and Social Security, the Ministry of Health, and the All-China Women's Federation have jointly issued a Notice on Enhancing Educating and Saving Prostitutes During the Crackdown on Illegal Criminal Activities of Prostitution; ‘The Ministry of Public Security: Prohibiting Parading Prostitutes through Streets or Exposing Them In Front of the Public’, (*China Legal Daily*, 12 December 2010) <<http://www.chinanews.com/fz/2010/12-12/2716060.shtml>> (in Chinese) accessed 1 September 2011.

¹⁴⁷ After an outcry from some members of the public on Internet expressing sympathy for the prostitutes and resistance of the use of shaming by the police, in July 2010, the Ministry of Public Security called on local departments to enforce laws in a ‘rational, calm and civilized manner’ and end the humiliating ‘shame parades’. (Reporter, 2010c)

shooting¹⁴⁸. China's administration of state-sponsored killings changed from public or semi-public practices to procedures protected from the public gaze; from cruel displays of taking lives to a relatively civilized approach; and from a propaganda instrument carried out in front of mobilized, enraged, emotionally-charged masses to a judicial procedure administered by rational, professional, impartial physicians. The pressure of international influences undoubtedly has contributed to these changes.

To sum up: despite the national-level authorities' obvious sensitivity to foreign criticisms, the actual process of removing shaming parades in various local regions across China has been a long and difficult process. The fact that the state-level authorities had to issue directives every few years to remind local authorities to restrain from practicing shaming parades indicates not only a collective psychological inertia in old values and institutions but also the tension between the central and local authorities in China. Indeed, this case study shows that the two-level political dynamics of domestic decision-making¹⁴⁹ has profound implications in criminal justice administration in general and capital punishment practices in particular.

In essence, central-level decision-makers and local-level decision makers have divergent interests vested in the penal processes discussed above. China's central authorities clearly care about both its international face and also its domestic gains, and have been struggling to deliver a package to satisfy both its international

¹⁴⁸ In February 2009, the SPC required courts nationwide to use lethal injections save in exceptional circumstances.

¹⁴⁹ Various scholars have noticed the dynamics of the two-level nature of a state's international relation and domestic politics. (Putnam, 1988: 100-101 and 109; Druckman, 1978; Walton and McKersie, 1965; Axelrod, 1987)

audience and its domestic bureaucracy. The local authorities, however, do not share such a need to change existing practices. Although it is expected that the local authorities are susceptible to control and surveillance from the top authorities under the contemporary top-down and centralized fashion of Chinese governance, the rise of localism after the launch of economic reforms in the late 1970s has made implementation of directives from central governance which do not meet the needs of local governments a daunting task.

Despite local authorities clinging to the practices of shaming parades, the recent public outcry against shaming prostitutes mentioned above suggests that public awareness concerning the rights and dignity of prisoners has gradually built up sufficient pressure to push local authorities to abandon this uncivilized practice. With this new combination of domestic and international forces, there is hope that shaming parades and sentencing rallies will finally disappear in the near future. This holds out hope that progress towards further restriction and final abolition of the death penalty will gain momentum once the abolitionist attitudes and anti-death penalty sensibilities get accepted by the general public.

The Failed Political Intervention to Save Akmal Shaikh from Execution

Akmal Shaikh, a British citizen, was caught smuggling approximately 4 kilos of heroin into China in 2007 and was charged with smuggling drugs - a capital offense, although a discretionary penalty, under Chinese criminal law and sentenced to death.

Repeated appeals for clemency were made on his behalf to the Chinese authorities¹⁵⁰ by, among others, his family, a British human rights charity called Reprieve, the then British Prime Minister Gordon Brown, the then Foreign Secretary David Miliband, and the Foreign and Commonwealth Office (FCO). The main argument, apart from the objection to capital punishment in principle, and especially for a drug offence, was the pragmatic one that Shaikh should be exempted from the death sentence because he was said to have a bipolar disorder and a delusional personality.¹⁵¹ After Shaikh was sentenced to death in October 2008 by the first instance court, the appeals against his sentence by the British stayed at the quiet diplomatic level and only became public before Shaikh faced the appellant trial on 26 May 2009 (Lefley, 2009; Reprieve, 2009).

However, these attempts to 'go public' to persuade the Chinese authorities fell on deaf ears. Shaikh's death sentence was confirmed at the appellant trial and finally upheld by the SPC on 21 December 2009. Shaikh was executed on 29 December 2009 as the first European national China put to death over the past 50 years. This sparked a strong international reaction. The Chinese government responded to the high tide of foreign criticisms by hitting back. Jiang Yu, a Chinese Foreign Ministry Spokeswoman, stressed that 'nobody has the right to speak ill of China's judicial sovereignty', 'it is the common wish of people around the world to strike against the crime of drug trafficking', 'we urge the British to correct their mistakes in order to

¹⁵⁰ This group of Chinese authorities and individuals includes the then President Hu Jintao, the National People's Congress and a judge in the intermediate court of Urumqi. (Eimer, 2009b; McGuinness, 2009; Reporter, 2009c)

¹⁵¹ Reprieve alleged that Shaikh thought he was going to China to record a song about a Little Rabbit which would inspire world peace. Britain made 27 ministerial pleas for clemency. (O'Shea, 2009; Pidd, 2009)

avoid harming China-UK relations', and that China expressed its 'strong dissatisfaction and resolute opposition over the groundless British accusations' (Eimer, 2009d; Reporter, 2009a).

Shaikh's case was a no-win game. Britain did not save its citizen from execution. China suffered reputational loss, despite the efforts it had made to establish a shining image before British and global media over the years. Britain was furious at China's stubbornness over its 27 unsuccessful appeals on Shaikh's behalf (Woodward, 2009) and in particular at China's refusal to allow a full mental health examination of the defendant by a foreign expert. China criticized Britain for requiring the Chinese judiciary to offer super-national treatment to a British national, claiming that neither Shaikh himself nor his legal representative proffered sufficient proof to show that he was mentally ill¹⁵². The Chinese believed the British side was interfering with China's internal affairs and its administration of justice.

The Chinese and the British have different priorities in a scenario like this. For Britain, protecting the right to life of its citizen was the top concern; for the Chinese, cracking down and deterring drug crimes was the priority. The Chinese and the British have widely different value systems and cultures and they barely understood the concerns of each other when dealing with Shaikh's case. It is surprising that—according to information available in media archives—no real dialogue or

¹⁵² The Chinese Embassy in London stated that 'there apparently has been no previous medical record', and that 'China has its own definition of mental illness and by that he is deemed to be mentally sound'. 'China Execution: International Reaction' (*BBC News*, 29 December 2009) <<http://news.bbc.co.uk/1/hi/8433300.stm>> accessed 19 August 2011; 'Diplomacy Cannot Undo Law of the Land (comments)' (*Global Times*, 24 December 2009) <<http://www.globaltimes.cn/opinion/editorial/2009-12/494027.html>> accessed 12 September 2011.

compromise was made between China and the UK on this matter. It is particularly surprising given that China and UK, despite their diplomatic disagreements on the status of Hong Kong, managed to compromise and have continued to enjoy a friendly and cooperative relationship since Hong Kong returned to China.

Furthermore, there remain some gaps between the Chinese practices in the field of criminal justice with what is generally recognized and accepted as minimal international human rights standards, to which Britain subscribes. What passes for 'normal' practices in Chinese domestic practices may be viewed as a violation of due process and human rights safeguards. In fact, although Chinese criminal law and criminal procedure law provide that the mentally ill are not subject to criminal punishment including the death penalty, it entrusts multiple legal authorities, not the defendant, with the power to initiate the psychiatric appraisal procedure. Therefore because none of the multiple authorities – the police, the procuracy and the courts – decided in this case to conduct a psychiatric appraisal on the defendant due to their belief that the materials provided by him were insufficient to prove that he was mentally ill at the time of conducting his criminal activities, the defendant had to be considered criminally liable.¹⁵³ What happened to Shaikh was thus not a rare case in the domestic judicial practice in China.

More importantly, the outcome of Shaikh case may have something to do with both the high-profile approach adopted by Britain to negotiate with China in the late stage of the case. The UK may have good reasons to use extensive media coverage on the

¹⁵³ See Chapter Three, Section One, 'Excluding Vulnerable Groups from Capital Punishment'.

Shaikh case during the second instance trial and the final review procedure, and encourage the participation of various branches of the British government, NGOs and public figures in the processes of negotiation with the Chinese government before the execution of Shaikh. However, given China's preference for soft, discreet and low-profile approaches when communicating with foreign countries and the rich experience of British and European institutions of engaging with China on human rights matters, forcing China to yield by widely politicizing a politically-sensitive capital case seems to be a risky strategy. Contrary to the expectation of the British side, historical and cultural factors turned out to play an important role in the decision-making and public-opinion forming processes in this case.

Factors of the case which were highlighted in the Chinese media include Shaikh's British citizenship, China's sovereignty, Shaikh's criminal conduct of trafficking a large quantity of heroin, such that it fell within the guidelines of the Chinese courts for the infliction of the death penalty, and the British media's attack on China's judicial system. Discussions of the Shaikh case in China drew heavily on history, namely Britain's 19th century opium trade, despite the ban against such illegal activities by the Qing Empire and the futile imposition of the death penalty for drug trafficking by Qing (Lovell, 2011). The failures of both the Qing judicial authorities to punish British drug offenders and the Qing military to fight against the British have been perceived as the beginning of China's 'century of humiliation'. Shaikh's drug trafficking reminded Chinese people of the history of the Opium Wars (the First

and the Second Opium Wars)¹⁵⁴ forced on China by the UK, the unequal treaties, and the notorious extraterritorial jurisdictions¹⁵⁵ imposed upon China as a result of China's failure in the war.

Shaikh was portrayed by the Chinese state-run media, and then perceived by most Chinese, as an unpardonably wicked British drug trafficker. The nationalist sentiments¹⁵⁶ were further fuelled by a *Telegraph* blogpost messages threatening to use Britain's 'gunboat' diplomacy to stop the execution of Shaikh¹⁵⁷. Public frenzy flooded blogs, online discussion forums, and the comment sections of newspapers. On a

¹⁵⁴ The Opium Wars, also known as the Anglo-Chinese Wars, divided into the First Opium War from 1839 to 1842 and the Second Opium War from 1856 to 1860, were the climax of disputes over trade and diplomatic relations between China under the Qing Dynasty and the British Empire. The first Opium war results in the Treaty of Nanking, which granted extraterritorial rights to foreigners in China, among other privileges. The Second Opium War culminated in 1860 with the looting and burning of Beijing by British and French troops and led to the Treaty of Tientsin. These military invasions of China and the unequal treaties between China and Western Powers were deemed as the start of China's 'Century of humiliation'. (Lovell, 2011; Kossoff, 2010)

¹⁵⁵ Extraterritorial jurisdiction was imposed upon China by Western Powers following the First Opium War. Under extraterritoriality, foreign Nationals of treaty powers were tried by consular courts, not subject to Chinese law. It is deemed as a violation of China's judicial sovereignty and judicial independence by Chinese people. There was also wide belief in China that foreigners who committed crimes against Chinese citizens were exempted from being punished under extraterritoriality. See (Wang, 2000; Mah, 1924: 678; Ogden, 1974: 13-18)

¹⁵⁶ (Banyan, 2009) Before Shaikh was executed, a cybercitizen commented in *Tianya Forum* (one of the most popular Internet forums in China) that 'the British government has made a scene there, and yet they expect things will be calmed down?!' Another one observed that 'whether Shaikh dies or not is already decided. Look at the public opinion in China!' There has been a heavy reference to extraterritoriality, for example, someone commented that 'Let's see how today's Qing Emperor provide extraterritoriality (to this British citizen)'. There were references to Opium Wars, such as 'Don't say you are aggrieved, asking your people to wage the third Opium War could work better!', 'Are the British going to wage a Heroin War against China now?', and 'Let's don't forget the Opium War!' Some said the government should ignore his mental condition 'If (our government) release a "mental person", there will be hundreds and thousands of "mentally ill" crowded into China'. There was reference to drug trafficking: 'China had so much pain (in the past) relating to drugs. We cannot set such a precedent!' Some comments said the Chinese government has no option but execute him, 'China will die if this person does not die' (all posts were in Chinese). See (Lai Qu You Yi Nian, 2009). Similar posts and comments are all over major Internet Forums in China such as bbc.163.com, qq.com, sohu.com, etc.

¹⁵⁷ In his *Telegraph* blogpost, George Pitcher proposed that UK and EU should employ gunboat diplomacy and trade sanctions to China. See (Pitcher, 2009). *Global Times*, a newspaper affiliate to the *People's Daily*, translated Pitcher's claims into Chinese and spanned a storm of criticisms and anger among the general public in China about the British media and British government. As of 14 September 2011, 20,900 results could be generated by keying in search terms such as '炮舰外交' (gunboat diplomacy) and '阿克毛' (Akmal Shaikh) in google.com.

webpage of Sohu.com, 2702 cybercitizens participated in a single-question public opinion survey which asked them to share their thoughts on Shaikh's death sentence being confirmed by the SPC. Two thousand - two hundred and twenty-seven respondents agreed with the statement 'whoever violates Chinese laws should be punished, regardless of his or her nationality. This is the only way to show the authority of the law of our nation'. Three hundred and fifty two supported the execution of Shaikh by stating that 'China, a sovereign state, is capable of announcing that whoever breaks its law should be punished accordingly', and 124 participants felt that 'the Chinese people can finally hold their heads up. In contrast to the mid-19th century, we can vent our spleen now' (Xinhua News Net, 2009).

The fact that the general public saw Shaikh as a common enemy of the Chinese people made it impossible for the judicial authorities to grant him clemency in China's unique domestic political landscape. Facing with flames of public indignation, the Chinese government would have faced high political risks by disregarding public opinion on such a politically sensitive matter. The political drama (Sebag-Montefiore, 2010) surrounding the Shaikh case provided an opportunity for the party-state to display its political power and authority in front of the domestic audience. This partly explains why the Chinese authorities were determined to execute Shaikh and why China's refusal to show mercy in this case stands in stark contrast with its willingness to grant mercy to foreigners and even war prisoners in the early years after the state-making.¹⁵⁸

¹⁵⁸ China repatriated most of the Japanese detainees during the Second World War and released the majority of the leading Kuomintang prisoners in six batches from 1959 to 1966. And a final amnesty in 1975 gave pardon to the remaining 293 Kuomintang prisoners. See (Fyfield, 1982).

Akmal Shaikh's case suggests that the Chinese government might well cherish its global image, but reputational loss is not always its paramount concern if it is in conflict with the party-state's political interest.¹⁵⁹ Indeed, avoiding losing face before the international community is a major driver of changes to China's practice, as shown in the earlier case of public shaming. However, the last thing the Chinese government would like to risk losing is public trust and support. Therefore no matter how irrational, ill-informed and unfounded the public opinion on penal matters is, the Chinese government will almost unexceptionally side with *domestic* public opinion regardless of *international* reputation loss.

Section Four. Examining Empirical Evidence from Elite Interviews

Section Four discusses empirical evidence obtained from elite interviews which I conducted in 2010, with the aim to explore and explain the dynamics of international influences as well as domestic political manoeuvre on the policy development of capital punishment in China. Eighteen of the 36 elite respondents who were interviewed by the author in 2010 were from China's national-level judicial and legislative authorities, i.e., the LACSCNPC, the SPC and the SPP. Of these 18 respondents, five were scholars who had been legal practitioners or in positions closely related to the administration of justice on capital punishment and the other 13 were judges, prosecutors and legislators. The other 18 respondents came from Higher

¹⁵⁹ Goldsmith and Posner seem to agree, stating '[o]ne might conclude that all things equal, nations will strive to have a reputation for compliance with international law, but a reputation for compliance will not always be of paramount concern because all things are not equal'. (Goldsmith and Posner, 1999)

People's Courts and Higher People's Procuratorates in four provinces across China: namely, Shanghai, Guangdong, Henan, and Hubei.

Varying Degrees of Distrust among Chinese Legal Elites towards International Human Rights Forces

My interviews showed that the Chinese legal elites generally recognize that China's changing attitudes towards capital punishment and its efforts to reform its capital punishment apparatus have been receptive to these social and cognitive pressures generated by the international community, and particularly from Europe. All but four of my interview respondents considered that the international pressure has been a key factor in fostering positive changes in China. In particular, the Chinese authorities seem to be responsive to external pressures harming or threatening to harm China's reputation or image before the international community. One interviewee explained: 'as the idea of international human rights disseminated into our society, the political leaders of our country and the elites at the SPC are willing to improve China's international image by launching reforms of our capital punishment regime'. Another respondent put it succinctly, 'we implement international standards (on the administration of capital punishment) to avoid losing face in front of other members of the international community'.

Nevertheless, in the absence of a shared cultural, intellectual and traditional affinity, Europe's trans-continental promotion of anti-death penalty norms and values in China - a jurisdiction that lacks democratic credentials, is geographically distant,

politically volatile, and culturally different from Europe - encountered significant local predicaments. Although the interviewees broadly agreed that China should 'strictly control and prudently use the death penalty, and gradually implement international standards', further exploration found that their understanding of and knowledge about the international human rights norms was limited. For instance, only three of my interviewees knew the full name of more than one international covenants or treaties in pursuit of restricting and abolishing the use of the death penalty. Quite a few of them even admitted that they had little relevant knowledge and they believed that such knowledge was not desirable for their role within the administration of capital punishment in China.

Moreover, analysis of the linguistic content of the responses of the interviewees suggests that varying degrees of cognitive discomfort were shown in most interview responses when I raised the term 'human rights'. Traces of psychological tension can be identified from the respondents' preference in word usage. Varying levels of distrust, scepticism, suspiciousness and hostility could be easily detected from their responses. This psychological uneasiness can be regarded as a response to the critical nature of China-global penal communications on Chinese human rights practice and its administration of capital punishment. The international human rights community, mainly comprising of foreign media and highly-publicized NGOs such as Amnesty International, has relied heavily on approaches such as criticisms, condemnations and shaming, routinely portraying China in a very negative light (Cooper and Lee, 1997; Peerenboom, 2005: 72-77). While promoting conformity and compliance by threats to stain target states' national image and reputation, these confrontational and exclusive strategies can also be counter-productive (Wachman, 2001).

In particular, the century-long history of China's encounter with Western colonizing forces made it more likely that Chinese authorities and public alike would react with acute sensitivity to Western concepts such as human rights (Weatherley, 1999: 155). In fact, international pressure is arguably one of the main reasons that the numbers of executions and death sentences remain China's most closely guarded state secret (Foot, 2000: 85-87). Besides convincing nation states to align their practices with those of 'civilized nations' (Risse and Sikkink, 1999), strong cognitive and social pressures could also force states to be secretive about practices that are the focus of shaming and denunciation. Indeed, some of my elite interviewees showed discernible negative attitudes towards human rights influences, frequently associating the concept of human rights with 'pressure', 'condemnation', 'criticism', 'accusation' while emphasizing that China need to 'revamp', 'restore', 'improve', and 'strengthen' its 'image', 'reputation' and 'face'. These responses suggest that while the abolitionist strategy of appealing to human rights rationales could be efficacious in pressing target states to take seriously the rights of its citizens, such a strategy may prove to be a double-edge sword.

Furthermore, apart from either forcing states to rationally calculate how non-compliance could hurt their self-interests and thereafter comply with international rules (Koh, 2005: 978-979), increasing external pressure could also lead states to develop coping mechanisms. China has attacked the concept of 'human rights' with a great deal of political propaganda to defend its policies and practices before its domestic audience. State-controlled media repeatedly states that the concept of human rights is closely linked to anti-China sentiments and foreign hostile forces.

State information and media censorship greatly reinforced the politicization of the issues and the manipulation of public discourses on the topic (Nathan, 1994: 638-642). The subjects of human rights and capital punishment were once taboos in public discourse and remain of high political sensitivity. One of the respondents explained his understanding of the subject, 'to me, "human rights" is a pretext used by foreign hostile forces to impose their own will; bullying us into obeying international human rights standards is a wanton interference with the domestic administration of criminal justice by a sovereign state.' Similar views were held by most other elites who refused to be interviewed.

In addition, the respondents tended to distinguish their own personal opinions from the official position of the formal legal authorities. Quite a few said that while *personally* they were abolitionists and supportive of the anti-death penalty movement worldwide, they believed that the Chinese government and legal authorities should not abolish capital punishment or adopt a radical reform approach because 'it is unwise and unpragmatic for the authorities to fully and immediately accept international standards, given China's special national conditions. An incremental, selective approach fits China's singular social situation better'. This commonly shared cautiousness among policy-makers, jurists and legislators illustrates the political sensitivity of the matter of capital punishment policies in the context of international abolitionist influences.

Chinese Elites' Concerns over China's Reputation and Image

These interview responses seem to suggest that the imposition of cognitive and social pressures on China through shaming via global media exposure has had some success. In fact, in the field of human rights, processes of persuasion and acculturation often involve strategies of shaming, shunning and denunciation (Risse and Sikink, 1999; Goodman and Jinks, 2004). For instance, shaming has been used by European activists to motivate the United States to curtail the use of capital punishment (Patterson, 2006; Girling, 2006). Indeed, the transnational anti-death penalty network, led by European organizations and institutions, promotes the international abolitionist movement as a war of civilization versus barbarity (Girling, 2005). The moral imperatives associated with abolitionism therefore require nation-states aspiring for legitimacy, reputation and status in the global community to restrict or abandon the stigmatized and pathologized practices of capital punishment. Shaming is clearly a viable leverage to induce behavioural compliance.

The data from elite interviews further confirmed the susceptibility of Chinese authorities to foreign criticisms and pressures due to concerns for China's global image and reputation. In fact, these concerns are said to be indispensable to the decisions of Chinese authorities to reform its capital punishment law and policies. Quite a number of respondents stated that they believed a most significant motivation for China's willingness to embrace international standards on the administration of capital punishment was to improve China's global image. One of my respondents, a judge of the SPC, commented:

'Domestic drivers are less crucial compared to international drivers.

After all, we have wide and strong support for capital punishment at

home. China's involvement in the international community, the high-level talks among political leaders, the criticisms and pressures, the possible damage to our national image, are the decisive promoting factors.'

A state's identity, reputation and image play an important part not only in influencing the way it communicates and interacts with other state actors in the international community, but also in the making of key domestic policies. All states are vulnerable to the moral pressures of international human rights forces and have a stake in maintaining their reputation as well-behaved members of the global community (Risse, 1999). It is well known that states comply with international norms to avoid the loss of their reputational capital (Guzman, 2002). Foreign criticisms and denunciation of China's failure to adhere to the civilized standards of practicing capital punishment has resulted in China's national reputational loss. Desperate to shed the stigmatized identity of human rights violator and to neutralize the impact of its negative image, China found reforming China's capital punishment norms and practices to be an excellent opportunity to show its willingness to move towards compliance with the minimum international standards on the use of capital punishment and therefore change the perceptions of other international actors.

Commenting on the removal of 13 capital offences from the Criminal Law, a legislator said that 'now that we have signed the ICCPR, we need to show something to the international community... the amendment (to the Criminal Law) is a gesture that could repair China's damaged reputation of heavy reliance on capital punishment'. Like other countries, China cares about its reputation on matters

concerning its administration of justice, which was evident in my earlier discussion about a series of governmental directives issued in the 1980s. My elite interviews also found that China's global image matters to elitist decision-making on penal matters, although international reputation or image is just one of the factors that influence the outcome and processes of legislative and judicial policies.

This being said, the case of Akmal Shaikh shows, these concerns about China's global reputation are subject to the paramount interests of the ruling party-state - the domestic political stability. The case of Akmal Shaikh exemplified how in reality the judicial decision-making process in capital cases can be complicated by domestic political dynamics in China. An SPC judge explained that as a high-profile capital case moves up the judicial hierarchy from Intermediate People's Courts (first instance courts) to the Higher People's Courts (second instance courts) and then to the SPC (final review court), the final decision of the case is determined not only on the decisions of judges but also on the balance of power among various parties, including the victims' supporters, the general public, the ruling Party and government, and the courts, seeking either the death penalty or a lesser sentence. The judicial decision-making process in high-profile capital cases is thus not purely a matter of legal fact-finding, reasoning and deliberation. It is essentially the outcome of collective political and legal manoeuvres.

For trials of capital cases which are relatively low-profile and the making of capital punishment policies in general, the attitudes of politicians and legal elites are important forces shaping these decision-making processes. The empirical evidence from my interviews confirmed that although in general sensitive to external pressures,

Chinese elites nevertheless share varying degrees of reservation and suspicion towards foreign criticism and persuasion. Even for the respondents who in general acknowledged the impact of international human rights, they often disagreed about when and how to push forward reforms of China's contemporary capital punishment machinery and to what degree China should comply with international human rights standards on the use of capital punishment. Some of them believed that international human rights forces had only a limited impact in China and/or that China should conform to international norms only when it is 'suitable' to do so. This attitude of conditional acceptance was based either on a time-contingent argument that it will be pragmatic for China to abide by the full set of international standards only in the distant future (but not at present), or a selective approach under which the Chinese government should only pick and choose the international norms which are 'compatible with China's reality'.

Finally, the findings from the elite interviews confirmed my earlier observation that in promoting China's reform of capital punishment, legal scholars and practitioners have played important roles. On the one hand, legal scholars have been working closely with legal practitioners in China. It is common in China that legal scholars are interested in and are allowed to take temporary positions in courts, procuratorates and other government branches relating to the administration of justice. It is also common that legal practitioners would pursue further academic development by reading in-service degrees and publishing academic articles. As a result, the unusual close ties between the two communities make it possible for reform-minded scholars to exert an impact on the reform of capital punishment

regime. There are, for example, commonly used terms in China, such as scholarly legislation¹⁶⁰, scholarly judges, and scholarly lawyers, etc.

Four of the five respondents who showed their unconditional support for international human rights norms were scholars who once worked as legal practitioners. And six of the total thirty-six respondents mentioned that elite scholars have played a significant role in promoting China's capital punishment reforms when talking about the promoting forces of the reforms. For instance, a SPP prosecutor said that 'scholars have constantly appealed for reducing the use of capital punishment in China and people who serve in judicial authorities like myself have been working hard in recent years towards this direction'. Another prosecutor said that 'the Eighth Amendment proves the influences of scholars in promoting China's capital punishment reform'. A scholar said, 'Chinese legal scholars in general supports international human rights values and this have influenced decision-makers in the legislature and judiciary'.

A degree of mutual deference also exists between legislators and established legal scholars. As mentioned in earlier chapters, I once had the chance to observe a closed-door meeting held by legislators and a group of established scholars to discuss the first draft of the Eighth Amendment during my field trip and found that the legislators encouraged participating scholars to comment on the draft and took

¹⁶⁰ 'Scholarly legislation' is a term to emphasize the role of scholars played in the drafting and amending legal statutes in China. For a brief description of the significant influence of renown scholars in drafting the 1997 Criminal Law, see (Ma, 2008).

careful notes of their speeches. Some of their advice materialized in the final legislation.

The Mystified Concept of 'Chinese Characteristics'

During the early-stage participant observations and archival research of my project, I found that the umbrella terms of 'Chinese characteristics' (*zhong guo te se*) or 'national circumstances' (*guo qing*) were frequently and widely used to justify legal elites' arguments for maintaining the *status quo* of China's capital punishment regime or against radical reforms of the existing system. A typical argument would be 'it is the rights of China to formulate its own capital punishment policies in light of its own national conditions', or that 'it is impossible for China to fully implement the international human rights standards as we have our peculiar social circumstances that is fundamentally different from the West'. These arguments are the set patterns that are frequently used by Chinese scholars and officials in various occasions in defence of Western criticisms on its capital punishment practices and law. Taken at face value, these arguments imply that the failure of China to comply with authoritative international standards is due to the so called 'Chinese characteristics'. However, further analysis of these line of thinking suggest that the Chinese authorities simply are unwilling or unable to change or challenge these existing 'conditions' or 'circumstances' to honour international standards.

As such, I asked all thirty-six respondents to explain the meanings of these broad and ambiguous concepts against the backdrop of China's capital punishment

administration. The results show widely differing understandings referring to multi-faceted aspects of Chinese society, including political, social-economic, demographic, cultural, social-psychological connotations. Specifically, their explanations included, but were not limited to, the following features of the Chinese society: China's centralized political system and the need of the party-state to maintain a tight social and political control; China's huge size and highly diversified population; relatively under-developed socio-economic conditions in China; the sky-rocketing crime rates in China which require harsh punishment to combat and deter; widespread social unrest and conflicts across China at an age of rapid social transformation; the retributive notion for 'a life for a life' which has been deeply imbedded in Chinese culture; the lack of tolerance among different social groups in today's China; the fact that the death penalty has been perceived as a valuable deterrent to combat crimes and maintain social order by the elites; that there has been no suitable and affordable alternative to capital punishment given China's volume of executions; and the overwhelming support for the death penalty among the general public in a populous China.

Quite a few respondents clearly hesitated or even seemed embarrassed when I asked them to explain their understanding of 'national circumstances' and 'Chinese characteristics'. According to my shorthand notes, the interval between my question and their answers is the place where the highest frequencies of mumbles and lengthy pauses occurred during the flow of the telephone conversations. These signals could be a salutary reminder that not only that even these Chinese professionals themselves realized that these terms are used as short-run excuses to justify China's capital punishment retention and the gaps between the Chinese practices and minimum

international standards. It seems that some of them were not completely clear about, and were not interested in finding out the reasons why China lagged behind the international norms. Their main interests and attention focused on justifying these practices, rather than understanding and challenging the *status quo* in China.

Alternatively, the fact that there is an absence of unified understanding of the meanings of these commonly used terms among the legal professionals offers another possibility for interpretation. It could suggest that China is home to a range of conflicting, and ever evolving, views on capital punishment and that the underlying cause of China's reliance on capital punishment is a complex web of interactions among various aspects of social life, be it political, institutional, cultural, or historical. At least, this suggests that the 'Chinese characteristics' and 'Chinese national conditions' does not merely refer to deeply entrenched legacy of culture and tradition in China. Thus, according to these legal professionals, capital punishment policies in contemporary China are not predetermined by Chinese history or culture. As one of the respondents said, 'although people normally would not or dare not admit, political and institutional factors are important shaping forces of our capital punishment policies'.

A 'Concentric Circle' Mode of Dissemination of International Human Rights Values in China

The evidence from my elite interviews suggests that the elites at the central level legal state organs were better informed about international human rights concepts and

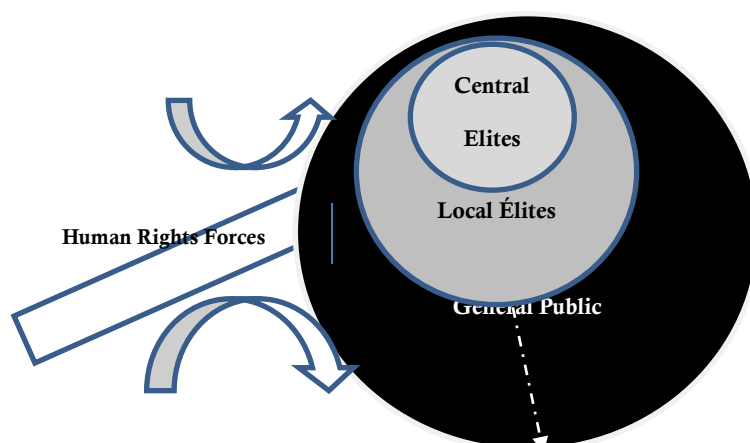
norms than the elites from one level down. Elites from the provincial-level sample group are inclined to reject international influences and human rights values, compared with those within the central-level sample group. In general, respondents at the central-level authorities held relatively open and receptive attitudes towards international appeals to abolish or limit the death penalty on the basis of human rights values than those working in provincial courts and procuratorates.

This variance in knowledge and attitudes towards anti-death penalty activism on the international level among different levels of legal elites could be explained, subject to some qualifications, by the route of dissemination of politically sensitive information in China. 'Human rights' was an alien concept before the late 1970s and has never been fully or substantially recognized by the mainstream penal discourse until now. Further, the topic of human rights acquired a dimension of domestic political sensitivity as China's human rights conditions were targets of frequent criticism by foreign media and organizations (Wan, 2001; Weatherley, 1999: 1-2).

As China gradually opened its door to the international community, human rights norms and ideas slowly made their way into the official and public discourses. What I describe here is that the foreign-generated information regarding human rights theories, values and practices has been filtered through different layers of social groups across the Chinese society in a pattern resembling a series of concentric rings. The innermost core consists of important policy-makers - politicians, legal elites and academics 'at the top' of the political-legal apparatus. They are among the first few coming into contact with all sorts of 'sensitive' information accessible only within the small circle. The sensitive information is comprised of classified information,

‘internal’ publications, foreign news bulletins, etc. (Nathan, 1986: 173) Foreign reports and writings about China’s human rights, due to their political sensitivity, were within this category of sensitive information.

Figure 7: A ‘Concentric Circles’ Mode of Dissemination of Human Rights Values in China



The outer part of the concentric rings can be further divided into multiple circular columns depending on the group members’ status in the state apparatus and their proximity to the sources of information. The commoner group, that is, the general public who obtain their information through state-run or state-controlled media, is at the periphery. The information relating to human rights they obtained via conventional methods has been filtered through multiple barriers and thus restricted and shaped by propaganda and censorship. As a result, the perception of and knowledge of the international campaign against the death penalty held by various social groups, from the centre toward the periphery, became increasingly limited and biased.

Understandably, those who have easier access to, and better chances to develop comprehensive and objective knowledge of Western criticisms of China's human rights practices and worldwide anti-death penalty movements are likely to embrace human rights norms promoting abolitionism or at least restricting the use of capital punishment. In contrast, it is easier for those who have limited and biased knowledge to develop a certain degree of distrust and hostility towards the idea that China's administration of capital punishment still lags behind minimum human rights standards and therefore should be abided by these standards. Understandably, this 'concentric circles' model (see Figure 7), although not free from the danger of oversimplification, is of considerable explanatory value in understanding the differing attitudes among legal elites and between elites and public towards China's capital punishment reforms.

Overwhelming Public Opinion in Support for the Death Penalty?

That China's 'public opinion' is in favour of the death penalty was identified by most of the elite interview respondents (34 of 36) as one of the most significant causal factors for China's extensive use of capital punishment. To prove this point, many of them described their personal encounters with murder victims' family members who insisted on punishing the offenders with the ultimate sanction to heal their pain. Yet some respondents do not believe legal elites in China are well informed of public opinion on the issue of capital punishment. A higher people's court judge considered elites 'from the top' are out of touch with public opinion. 'The people "at the top" are

clueless about the real public opinion', he claimed. A SPC judge, however, believed that the politico-legal authorities stay well informed of the status of public opinion. She said, 'we legal practitioners have widely-share consensus on the state of public opinion in China, that there is overwhelming support for retaining capital punishment for a wide range of capital offences'.

The findings from the elite interviews show that legal elites, regardless of their positions in the hierarchy of legal apparatus, shared common sources of public opinion. To them, the Internet is the most commonly used channel to obtain information regarding public attitudes towards capital punishment. Their understandings about public opinion on capital punishment were also heavily reliant on their own experience in dealing with individual capital cases. Further channels of information used by legal elites include state media reports (newspapers, television, and the online news reports) on high-profile cases or controversial legislation, their knowledge of the opinions of those directly involved in individual cases that they dealt with (in particular the victims' family members), general opinions of their acquaintances (family, friends, colleagues, etc.), and in some instances the results from small-scale surveys among residents of local areas. In the absence of a nation-wide, systematic quantitative measurement of public opinion, the alleged 'public opinion' on capital punishment is at most a widely-shared *perception* of the public opinion. Opinions are formed from the emotionally-charged comments posted on BBS forums, online discussion boards, blogs, microblogs, etc. regarding a few high-profile capital cases and cannot be thought to be 'rational' or informed.

Thus, the near-consensus among legal elites that ‘the general public in China has a strong desire for capital punishment’ seems to be formed on an aggregation of the sketchy thoughts of those who were only vaguely aware of the real complexities of a serious policy matter, fleeting emotions shown online, and expressions of personal anger and revenge by the victims’ family members. At most, this ‘consensus’ is a blind assumption taken for granted by legal practitioners, reinforced by state propaganda and left unchallenged by empirical studies. Of course admitting the ‘overwhelming public support for capital punishment in China’ is a fiction does not prove that it is a false reflection of the reality; rather, the data are inadequate for understanding public opinion.

While Chinese legal elites desperately seek possible sources of information in order to better understand the puzzling, unpredictable and elusive ‘public opinion’, they find themselves baffled by the lack of accessible and transparent channels of information. Predicting public sentiments and emotions and aligning the outcome of capital cases to achieve the optimal ‘social effect’ (The Supreme People’s Court, 2010) is therefore a considerable challenge. The possibility of conducting an official nationwide survey on public opinions toward capital punishment is overshadowed by the fact that the Chinese authorities continue to maintain a tight control on the public discourse on capital punishment. Concerned about the possible social instability that public discontent could trigger once the country loosens its grip on information control in this regard, a legislator exclaimed, ‘how dare you think about the possibility of doing a nation-wide public opinion poll? That’s unthinkable and intimidating to me!’

Conclusion

China's active use of the death penalty has long sparked international discomfort; however, the past decade reveals nascent trends towards openness, due process, and awareness of humanity, which may provide the foundation for stronger protection of condemned prisoners and a gradual change of China's attitudes towards international human rights, albeit to a limited degree. By taking small steps forward to bring its practice regarding capital punishment more in line with international standards, under both domestic and international pressures, China has sent out messages to its international audience of its conditional willingness to embrace international human rights values in the field of capital punishment.

Capital Punishment reforms in the mid-2000s brought a fresh opportunity for researchers to further understand whether these changes are products of the global dynamics of abolishing and restricting the use of capital punishment. Empirical evidence from my elite interviews suggests that international human rights norm-setting has contributed to the reforms of capital punishment in China, but only to a limited degree. International human rights influences serve as a necessary but insufficient condition for the evolution of contemporary Chinese capital punishment regime, without which the reform process may not have developed at such a speed and on such a scale. After all, it is the *combined* strength of international influences and other domestic social dynamics that operate to determine the current and future state of China's death penalty law and practice.

This seemingly contradictory conclusion may be due to the approach of norm diffusion in China. The dissemination of international human rights norms and values has influenced Chinese society in a top-down fashion and the strength of international human rights has been reduced while it diffuses into the inner layers of Chinese society. Moreover, a pressure and criticism dominated approach is a double-edged sword. Mounting pressures on China, mostly threats to hurt its image and reputation, has created positive changes in the past decade. Yet the complication of the predominance of criticism and shaming can also lead to incomplete internalization and temporary obedience of human rights norms, which can easily be reversed once the exogenous pressure is removed. Empirical data shows that, under external pressures, a shared distrust and hostility formed and developed, leading the Chinese government to adopt defensive measures such as creating secrecy around the data regarding the administration of capital punishment.

In comparison to the failure of anti-death-penalty human rights norms and jurisprudence to solicit compliance in the United States and the success of international human rights forces to force obedience in Ukraine illustrated by Bae (2007), examination on the impact of human-rights based instruments and mechanisms in China shows mixed results. The seemingly paradoxical argument about the power as well as the limit of human rights impetus, nevertheless, provides the best evidence of the interplay between the softer mechanisms of transnational human rights forces and the counterweight of local political, social and legal institutions.

In contrast with Ukraine, China's size, population and growing weight in the international affairs determines that its domestic penal policies are less susceptible to external material inducement such as the benefits of join the EU or the clout of coercive forces. Softer approaches such as persuasion and acculturation - which rest upon the attractiveness of the human rights values, the ability of moral authorities to manipulate international and domestic discourses and opinions in a manner that make norm violation by 'delinquent' states morally shameful, and commutative process involves bargaining and arguing - will foster *bona fide* adoption and compliance only when the external norms are effectively internalized.

In other words, fundamental attitudinal shifts will occur only if the target states are fully convinced about the validity and rightness, in comparison with the situation where states' compliance is the outcome of threat of coercion, material inducement and incentives. This may explain the fact that China is in the progress towards full compliance with international human rights norms against the use of the death penalty. It may have been aware of the 'logic of the consequences' of international human rights forces and yet to accept the 'logic of appropriateness' (March and Olsen, 1989; March and Olsen, 1998; Risse, 2004) of international human rights values.

In comparison with the Americans' determination to turn a deaf ear to international trends towards abolition (Bae, 2007; Koh, 2002), China seems to be more susceptible to the communicative power of human rights mechanism. The US's refusal to abide by international human rights norms in regard to the death penalty may be explained by the fact that the United States is less subject to human rights mechanisms of

naming and shaming in comparison with China. The status of the US as a world superpower, a moral leader and a long-time proponent of human rights render it unproductive, if not unfeasible in some circumstances, for advocates for abolition worldwide to directly challenging the United States on its stance on the death penalty or to force it to change its position via mechanisms such as coercion, inducement or shaming. The only useful counterweighing mechanism adopted by abolitionist states to date has been refusals to extradite criminals wanted to the United States to be prosecuted as in *Soering v. United Kingdom* (1989). This stands in contrast with the stronger pressure forced upon China by human rights promoters through naming and shaming. In addition, the United States may be less vulnerable to the socialization forces of international human rights as its use of capital punishment has long ceased to be a functional instrument for crime control in the post-Furman era (Garland, 2010), in contrast with the fact that the death penalty remains an essential part of its operational criminal justice machinery (Johnson and Zimring, 2009: 8) in China and other retentionist countries ranking high on the execution-per-capita list.

To sum up, as long as the death penalty remains a dominant social control method and a powerful symbol of government authority, substantial changes will only be promoted by building on the genuine efforts to date made by human rights promoters to engage in dialogues with the Chinese government in a flexible and culturally-sensitive manner and by successful endeavours by the government of China to promote among its citizens an understanding of why the death penalty inevitably in practice violates the human right not to be subject to a cruel, inhuman and degrading punishment (Hood and Hoyle, 2008).

Conclusion

A Better 'Economy of Power' to Punish with Death

The previous chapters, taken together, suggest that the voluntary, top-down, and elite-led reform of China's capital punishment law and practices in the past decade or so has brought greater consistency, regularity and leniency to the regime. The scope of capital offences in law has decreased substantially; the discretionary powers of trial and appellant judges have been restrained to minimize arbitrariness, inconsistency, and mistakes; the main method of execution has shifted from execution by firing squad to lethal injection; and the SPC has assumed the sole authority of review over all capital cases. These reform measures have yielded a decline in the severity and volume of capital punishment, a civilization of its application, and in Foucault's terms, a better 'economy of power' to punish (Foucault, 1995: 79).

A most important contributing factor to the gradual weakening of punitivity in the infliction of capital punishment since the mid-2000s, as argued in Chapter Five, is the significant impact generated by the socializing power of international human rights forces on the mentality of Chinese elites, the political and penal discourses, and the institutional arrangements in relation to the administration of the death penalty. Despite varying degrees of resistance, scepticism, distrust and reservation, the attitudes of the Chinese political and legal elites towards capital punishment and human rights have gone through remarkable transformation, resulting in reduced

defensiveness and greater willingness to discuss potential reforms (Hood, 2009: 1-5), as well restructuring of penal institutions and penal power. These changes, according to the empirical evidence from elite interviews, are spurred by the soft mechanisms of persuasion and acculturation in international human rights law, as well as China's concerns over its reputation and image in the face of the international community.

Meanwhile, Chapter Five argued that the effectiveness and extent of reforms should be evaluated with guarded optimism. Based on empirical evidence from elite interviews and library-based research, Chapter Five claimed that the dissemination of human rights values and concepts in China is subject to considerable domestic resistance. This resistance has led to the fact that after reform, the practices and norms in relation to capital punishment in China still lag behind internationally-recognized minimum legal standards. Even after the implementation of a series of reform initiatives, capital offences in law are still far too many, the volume of executions is far too high, the entire judicial process is too hasty and the judicial due process safeguards assured by law remain vulnerable to exploitation and abuse.

Chapter Five argued that the limits to the influences of international human rights forces can be explained by several factors: the varying degrees of distrust of Chinese elites towards human right forces; a 'concentric circle' mode of dissemination of international human rights values in Chinese society; the unsupported assumptions that China has its peculiar national conditions necessitating the retention of the death penalty and that Chinese public opinion is overwhelmingly in favour of the harshest penal sanctions. While divorcing transnational penal discourses on the grounds of human rights from the 'messy world of penal populism (Girling, 2006: 77)' it is

possible on a conceptual level that the lines of demarcation could in reality be obscured. A full understanding of the impact, in particular the limits to international influences, necessitates a considerable knowledge of the domestic political landscape, manoeuvres and dynamics.

After surveying this historical use of capital punishment in imperial China I have argued in Chapter Two, the use of capital punishment was not one-sided, cruel and arbitrary when compared to Western countries. The available data about capital punishment in the era of Republican China is far from being complete or rich, however it appears to suggest that China has endeavoured to modernize and civilize its penal system and the Nationalist's capital punishment policies were nowhere close to being excessively punitive. In terms of the quantity of executions it is only in the mid-20th century that China's use of capital punishment started to distinguish itself from other nations in Asia and worldwide. On the basis of existing historical archives, this thesis rejects a culturally or historical deterministic explanation of China's reliance on capital punishment as it is hard to substantiate such an argument.

Moreover, it seems that the lenient aspects of the meticulously-designed capital punishment regimes in the old days may have inspired contemporary capital punishment reforms. Indeed, the cyclical upswing and overuse of the death penalty in the penal history of the People's Republic is best understood by reference to the ideology, institutions, attitudes and interests rooted in the socio-political conditions in China as they existed in the second half of the 20th century, rather than remnants from the past. Similarly, the reform of China's capital punishment regime is also the outcome of the conflicts, compromises and consensus of competing forces, attitudes,

and institutions within China's political regime and the criminal justice system.

Chapter Five explains that interpretation of the transformation of the Chinese capital punishment regime should focus on the deeper tensions between elitism and populism, between decentralization and centralization of penal power, between judicial independence and political interference. It is the shifting power balance of competing forces that promoted and facilitated development in the use of capital punishment towards restraint, efficiency, regularity and humanitarianism.

Arguably, the reform of capital punishment in China should be read as merely a rearrangement of the power to punish and consolidation of institutional arrangements relating to the use of state-sanctioned violence within the existing political and penal regime. The reform process is not so much one intended to bring about abolition in law or in practice in the near future, nor a fundamental transformation of the criminal justice apparatus and ideology. It is just a strategic adjustment of the administration of capital punishment. The objective of the voluntary, elite-led reform process is to refine, regularize and consolidate the power to punish. Despite conflicts of interests and commonly-seen disagreements among the main stakeholders, the reform was first launched by the top judiciary, coordinated by lower judiciaries, the police, the prosecutors, and later supported by the efforts made by legislators. It is not, or at least not mainly, a fundamental change initiated and fostered by grassroots civil society that aims to challenge the coercive power of the state and the state-sanctioned use of violence.

This partly explains why the reform process was self-contained. The main aim of the reform was to rectify the dysfunctional machinery of capital punishment, rendering it

more effective, regular and consistent, and less prone to error. Further, reforms focused on bringing about a meticulous and adequate review process, vesting less power in the lower hierarchy of judicial bodies, curtailing the arbitrary power of police and prosecutors, narrowing the freedom and discretion of judges in sentencing, and removing some of the capital offences which were rarely used. The intention of the reform was not to completely eliminate or even reduce the power to punish with death, but to improve the function of this power and thus reduce the social and political costs associated with the operation of the regime. Similar to Foucault's observation about penal reform in 18th century Europe (Foucault, 1995: 73-82), the birth of capital punishment reform in 21st century China represents not so much a new sensibility, but the growth of ever-more rational, efficient but repressive systems of control.

The Use of Capital Punishment as an Instrument for Social Control

After examining the regional pattern of the death penalty in Asia, Johnson and Zimring observed that China's current high rate of executions is determined by political factors (Johnson and Zimring, 2009: 244-253). By tracing China's use of capital punishment over the past six decades, this thesis argues that in relation to the assertion that law in Communist China is simply one of a number of means to be used, altered, or set aside at will by the political authority, the use of capital punishment is mainly an instrument for political governance. In order to study variations in the general patterns of capital punishment policies over time, this thesis roughly divides Chinese contemporary penal history into three stages – the Maoist

era (1949-late 1970s); the Deng-Jiang era (late 1970s- early 2000s); and the most recent era under the Hu-Wen administration (early 2000s-2012). It found changing political meanings in the use of capital punishment in China across the three periods.

The primary utility of capital punishment under Mao Zedong's rule was as a populist tool for class struggle, political repression and ideological control (Johnson and Zimring, 2009: 257-262). Capital punishment later served as a tool to fight crimes during China's transition towards capital market-oriented economy. Among other factors, the authorities' fear of a rapid rise in crime rates had the most significant impact on the periodic toughening up of capital punishment policies throughout the Deng-Jiang era (Dutton, 1992; Liu and Messner, 2001b). Nowadays, the demands of the masses for revenge, justice, and equality have been translated into a fervent passion for capital punishment for certain offences and offenders. By reaching out to satisfy these public demands and sentiments, the party-state hopes to enhance its political legitimacy. In this sense, the death penalty serves as a populist mechanism to strengthen the resilience of the authoritarian party-state by venting public anxiety and resentment towards social problems created in the processes of China's rapid modernization and social fragmentation.

The thesis, however, hesitates to ascribe the political reasons for China's reliance on capital punishment solely to the political orientation of the Chinese government.

Chapter Four explained in detail that China's use of capital punishment is essentially a product of deeper socio-political tensions. It is determined by a range of ideological, institutional, and attitudinal factors rooted in different aspects and levels of Chinese society. The characterization of the Chinese government as an authoritarian, non-

democratic polity only explains the overall structure of the Chinese polity, i.e. the fact that the majorities do not have the power to influence the political decision-making process and its outcomes. However, such a characterization does not reveal the dynamics of the struggle between different social groups within that polity; its broad categorization conceals the changing interests and priorities of the ruling regime; and it does not explain the tensions and conflict of interests between masses and the states authorities as well as between different hierarchies of political and legal institutions which have been proven to exist underneath the overall authoritarian political structure.

Of course, this is not to dispute that the use of capital punishment in China is, to a large extent, politically driven, but rather that the political meanings associated with Chinese capital punishment policies are more nuanced and richer than the notion that capital punishment is nothing but an expression of the totalitarian or authoritarian power of a few political leaders at the top. Take Mao Zedong for instance; his capital punishment regime may be the strongest expression of the authoritarian power of the Party-state compared to later periods. Nevertheless, Mao's political control mechanisms are qualitatively different from those of Stalin's totalitarianism because the dynamics of his power struggle campaigns, though initiated by directives from above, were often fuelled by enthusiastic voluntarism from below (Tu, 1996: 164; Glover, 1999: 292; Strauss, 2002). Without the overwhelming consensus of the popular will, although manipulated and encouraged by the political leadership (Strauss, 2002: 95-98), neither the political campaigns (Tu, 1996: 164) nor the excessive use of capital punishment could exert such devastation.

In fact, although the last decade of the Maoist era in penal history (Zhang, 2008: 117-118) could be termed 'lawless' in general (Ladany and Nāth, 1992: 3; Donahoe, 1988-1989: 173), in the mid-1950s, there was a sincere attempt by the Party to develop a formal legal institution which resembled that of the Soviet Union (Cohen, 1968: 11). Even under Mao's rule, public attitudes did have an impact in shaping the capital punishment policies of the Party (Scobell, 1990: 506-507), although the form of these opinions are greatly influenced by political propaganda and manipulation. It is relatively well known that Mao Zedong, 'one of the bloodiest megamurderers in the 20th century' (Rummel, 1994: 8), publicly endorsed the use of two years reprieve of death sentences instead of immediate execution for those whose conduct was not heinous (Mao, 1986: 189, 202-203) at the time of the highest rate of executions around 1951; he also stressed that death sentences be used cautiously in a limited number of cases (Scobell, 1990: 505). Moreover, Mao Zedong's penal philosophy was challenged by Liu Shaoqi and his followers who anticipated even at that time that capital punishment would be abolished shortly by the Communist China. If he had prevailed in the competition for political power, the pattern of China's use of capital punishment may be totally different in the following four decades (Lu and Mieth, 2007: 45). It is even less well-known that the CCP declared as early as 1922 that one of its final aims was to 'reform the judicial system, abolish the death penalty, and stop corporal punishment'¹⁶¹.

¹⁶¹ 'The First Proposal on Current Affairs from the Chinese Communist Party' (15 June 1922), in The Research Office of the Party's History for the Party School of the Central Committee of the CCP (ed.), 'Reference Materials of the History of the Chinese Communist Party' (Beijing: People's Press, 1979) 341.

Similarly, rather than seeing the excessive use of capital punishment in Strike Hard Campaigns as the outcome of the personal preferences of Deng Xiaoping and his alliance, it is better understood as resulting from *both* political interests of the political authorities *and* the socio-political environment of that particular period of time (Messner et al., 2006: 585). Economic growth became the new legitimacy of a proletarian Party (Deng and Cordilia, 1999: 215) around the early 1980s as China migrated from a state-planned economy to a capital market while the surge of new types of crimes and the swiftly-increasing crime rates (Tanner, 1999: 166) were seen as crucial threats to economic growth. The widespread anxiety and fear may have lowered public tolerance for criminal activities and even bred a desire for cheap and harsh penal mechanisms to fight crimes (Johnson and Zimring, 2009: 267). Fighting crime and pacifying the widespread public fear of crime thus became a national priority and a handy tool to strengthen the public's confidence in the ruling Party (Tanner, 1999: 190; Trevaskes, 2007a; Dutton, 2005b). This was the socio-political foundation for China's adoption of radical crime-fighting strategies and thus liberal capital punishment policies – as evidenced by increasingly aggressive capital punishment policies, a spike in the rate of executions, expanding the scope of capital crimes in law and the relaxation of review procedures.

During the most recent era under the rule of Hu-Wen, apart from remaining as a symbol of political power and authority, capital punishment has acquired new political purposes. Running parallel to its old task of maintaining political rule and governing crimes, satisfying public demand for justice, equality and revenge has attained a central place in the instrumental values of capital punishment. The control

technologies of the political-legal authorities in today's China differ significantly from those in the past, especially with the popularization of the Internet as a new outlet for public opinions (Herold and Marolt, 2011: 5-6). With the gradual scaling down of top-down political control, there was a growing space for civil society and expression of ideas by the people at the grassroots level. In this context, courts are increasingly 'responsive to protests, petitions, and public opinion' in this authoritarian regime (Liebman, 2011b; Landry, 2008) 'to an extent beyond that of even some democracies' (Wang, 2008a: 145). The functional meaning of capital punishment in Chinese society has shifted from acting as an instrument for cracking down on wrongdoers, counter-revolutionaries and criminals alike, to a means of solving the contradictions among different social groups in an increasingly fragmented society. The ultimate punishment has become one of the tools to 'harmonize' Chinese society.

To take stock, the politics in the use of capital punishment in China may be far more complicated than we have previously assumed. Capital punishment certainly serves the aim of confirming and strengthening the political legitimacy and authority of the Party-state. Nevertheless, the rich meanings and functions associated with capital punishment policies, practices and institutions, to be properly understood, must be placed in the specific social context at a particular historical juncture. Only in this way, are we able to explain shifting meanings and functions of the Chinese capital punishment regime. A whole range of politico-social factors - intertwined, interdependent and interactive - form a complex and dynamic web of forces that sustain the life of capital punishment in today's China and the change of power balance among them allows self-contained adjustment of the regime. Specifically,

capital punishment policies and practices are closely influenced by the common beliefs, biases, attitudes and fleeting sentiments held by the public, by the status, power and functions of different levels of legal institutions, by the needs and interests of political organs, by the desires for revenge by victim groups, by the relationships among the political institutions, courts, and the general public, by the external pressures from the international community, and by the inertia of institutions and ideologies.

Looking Ahead

One of the most daunting tasks for researchers in social science may be to predict the future of social phenomenon, given the wide range of uncertain variables that may be involved. Within a given jurisdiction, complicated social conditions work in a mysterious way (Steiker, 2002: 101) to determine, shape or influence how a particular social phenomenon such as capital punishment evolves. In the context of China's use of capital punishment, a most frequently asked question is: whether and when will capital punishment be substantially restricted, and finally abolished in China? Here I will look at the efforts made by the most thoughtful minds in the field of criminology. Durkheim predicted in his *Two Laws of Penal Evolution* that as societies advance to a greater level of socio-economic conditions and as state-power becomes less centralized and absolute, the intensity of punishment would moderate and that incarceration would replace capital punishment as the most routine form of penal punishment (Durkheim, 1973: 285-286).

Durkheim's observations and analysis in general correspond with the trends of penal development in China over the past six decades or so, when the use of capital punishment has been significantly civilized; due process safeguards and humane modes of execution have been introduced; and the use of capital punishment has decreased in volume and in scope. Durkheim's model, nevertheless, does not include variables such as international influences, which may have significant impact on the penal policy making of a nation state. This macro theory also has limited explanatory power in distinguishing different paths to abolition among various states and cannot adequately forecast short-term trends such as fluctuation in the rates of executions in China since the 1980s and the oscillating trend following the recall of review power by the SPC.

The most recent and authoritative forecast regarding the use of capital punishment in Asia has been made by Johnson and Zimring. In general, they hold an optimistic view that the abolition of capital punishment in Asia will not be 'a question of whether but of when' (Johnson and Zimring, 2009: 328). In broad terms, they believe that the abolition of capital punishment within Asia is inevitable with the development of socio-economic conditions, the continuing stigmatization of capital punishment as a human rights violation, and an emerging consensus that the abolition of capital punishment is increasingly a desirable goal among Asian countries. This regional-specific prediction is supported by rich findings gathered by the authors after careful surveys of the patterns in the use of capital punishment in multiple Asian countries.

Although the division between the short-term and long-term future might be arbitrary and blurry, I still find it very hard not to explain my prediction on future patterns of China's use of capital punishment without using this near-far distinction. This is because, apart from wild speculation, it is almost impossible to make accurate long-term future projections about Chinese penal policy in the area of capital punishment as it is difficult to speculate the associated institutional, socio-economic and political conditions in such a rapid-changing environment as China in the long run. Even if I have to make such a prediction, it will not be much different from the predictions above made by other scholars. That is, in at least a decade and beyond, with the 'mechanical' (Durkheim, 1973: 305) historical force promoting evolution of the capital punishment regime and collective sentiments against crime gradually softening in the future, China will not abolish the death penalty for major offenses such as robbery, intentional injury leading to serious consequences and even drug offenses.

However, from the available evidence and observations about contemporary Chinese penal history, it does not appear to me that China will abolish the death penalty or significantly narrow its scope in less than a decade. And there will probably be a long period with little change before the use of capital punishment will decline significantly for offenses considered 'extremely serious' by Chinese law and practice. This prediction is based on the projections of both international factors and domestic forces. The likelihood that the influences of international human rights on China's practices in the area of human rights and capital punishment will greatly intensify is not very high. With the vanguard and engine of the abolition movement - Western Europe (Hood and Hoyle, 2008) - trapped in financial crisis, its willingness and

capacity to continue to lead and endorse abolitionist campaigns is unlikely to grow significantly in the short term. On the other hand, with China's peaceful rise to great power status (Zheng, 2005), its role has been transformed from a member longing to further participate in policy-making in the international community to an active player with great influences in the arena of international politics, diplomacy and economy (Medeiros and Fravel, 2003). As explained in previous chapters, the recent past saw new trends showing China's increasing capacity to influence and manipulate the discourses and behaviour of foreign states and organization in the field of human rights and capital punishment, instead of passively absorbing international pressures.

With the continuous rise to great power status of the world's leading executer, the possibility that international forces promoting abolition of capital punishment can exert real pressure on China will likely decrease in the future. With the changing power balance between China and the international community, the latter may find it increasingly difficult to influence China's decision-making on matters of capital punishment, in particular if the restriction and abolition of capital punishment contradicts the political interests of the ruling Party-state in the short-term. Moreover, although concerns for reputation of image may continue to prompt China to demonstrate some inclination to abide by international standards, the fact that China has already launched a series of reform initiatives to reduce arbitrary and excessive use of the death penalty may serve as the best excuse in the near future for China to refute criticisms. China will probably be less motivated to be responsive to foreign pressures aimed at stigmatizing China's capital punishment practices and policies.

On the domestic level, as discussed in the thesis, the recent capital punishment reforms first gained support from the public but later met substantial resistance. In order to maintain social stability and not to offend hard-to-predict, spontaneous outbursts of public sentiments, the Chinese government will probably continue to withhold information on capital punishment sentencing and executions from the public. Without the dissemination of findings from proper empirical research on the flawed capital punishment regime and data obtained from large-scale public opinion surveys to measure the attitudes of the general public on capital punishment, it is unlikely that reform-minded elites or activists can turn the public away from a strong appetite for capital punishment in the near future. It is only through learning about which social class or groups are most likely to be subject to capital punishment that the public discourse on capital punishment may change its direction. But even then, if the public can accept lesser punishment as a substitute for the death penalty for crimes which endanger collective interests of the society as a whole (such as corruption), it will take even longer for members of the society (for example the families of victims) to accept sentences other than capital punishment for crimes of violence (murder, rape, smuggling babies, etc.) And under the current state-society relationship in China, changes to public attitudes do not appear to be easy to achieve.

Of course, states do not have to wait until most of their citizens are willing to accept abolitionist values in order to abolish capital punishment in law and practice. In fact, many countries in Europe have achieved abolition through elite-led moratoriums and abolitionist movements, despite strong public support for capital punishment during and even after abolition (Hood and Hoyle, 2009). However, as Greenberg and West observed, 'Retentionist societies are not all cut from the same cloth, nor are all

abolitionist societies'(Greenberg and West, 2008: 332). The socio-political environment in China nowadays – fundamentally different from those of Europe in the 20th century – is not ripe for fostering elite-led reforms of capital punishment in the face of strong opposition from the public. Available evidence suggests that the Chinese legal and political institutions are sensitive, responsive, and submissive to the demands of the public.

Specifically, reform-minded elites in China do not have the political opportunities and the power of their equivalents in Europe to influence the national legislature in the face of public resistance. China's courts lack independence and autonomy to push forward substantial restriction on capital punishment facing immense pressure from the public and the mass media after the recall of the review power by the SPC. Chinese government has inadequate incentives to advance reforms as external pressure wanes and internal resistance remains, simply because the political risks associated with this initiative would be too high and the political gains will be low. Moreover, unlike Europe, capital punishment in China has become a matter of high public interest since the early 2000s. In the United States, public support for capital punishment can find direct and strong expression in some form of political accountability (Garland, 2005: 362); similar trends have also developed in China. The terrains of social, political, and legal institutions in China determine that the Chinese path to abolition has been different from those of European countries to date, and will remain distinctive in the short run.

In fact, this thesis has observed a trend that after the gradual and slow political liberalization, there has been an emerging populist political structure of criminal

justice in China, in some ways similar to that in the United States. And it has been proved that such a populist political structure of criminal justice in the United States has fostered an environment contributing to the survival of capital punishment institutions (Garland, 2005: 363). The future of China's use of capital punishment will therefore largely and increasingly depend on whether the majority of the citizens, who have the numerical power to 'vote' on the matter online or through mass media, can be effectively mobilized against capital punishment.

Disseminating human rights values is an important approach to foster changes to public attitudes, but the success or failure of this infiltration process then depends on the institutional landscape inside China and the exchange of information between Chinese citizens and the outside world. Engaging civil society and cultivating a favourable environment to plant the seeds of mercy, human dignity, and tolerance seems to be a difficult yet important task. Further criminological research, in particular empirical research, is also of critical value in terms of changing the deep conviction among the public that the death penalty is an effective tool to combat corruption and violent crime. In addition, elite scholars and criminal professions should seize any possible opportunity, such as the spontaneous public sympathy for capital offenders in the cases of Wu Ying, to promote abolition of at least a particular category of capital crime. But after all, unless domestic political and legal institutions in China undergo some meaningful changes, the outlook for the near future seems to be less than optimistic. And in fact, even if all the political and legal factors associated with China's use of capital punishment go through extensive change in less than a decade, if the populist culture grows more entrenched in the old political

and legal practices, there is no guarantee that capital punishment won't be a permanent fixture in China's penal system for the next few decades.

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Note: This thesis uses Endnotes as the reference manager. However, an internal bug of the software prevents it to distinguish I (upper case) and l (lower case) in the middle of Surnames. Therefore, for instance, LebIang in the Bibliography should be Leblang.

Appendixes

Interviewing Elites in China on a Politically Sensitive Topic: Challenges and Implications

The thesis relied on mixed methodologies to examine the law and practices in the field of capital punishment in China. More specifically, the methods and strategies that have been used in the stages of data collection, design and analysis include elite interviews and library-based research. These are primarily qualitative research methods. I have found that blending and combining these different techniques and approaches produces richer data; this mixed method is also beneficial in that the researcher can relate complement findings to each other. At the data collection stage, for instance, library-based research provided the base-line information and helped to avoid 'elite bias' from my elite interviews with legal professionals in China.

Moreover, library-based research facilitated the research design stage by helping with conceptual and research instrument development of the thesis and also discovering paradoxes and contradictions that helped to frame the research questions. Lastly, at the data interpretation/analysis stage, the data obtained from the interviews with legal elites in China played an important role by clarifying, illustrating and validating information I have obtained through observation and library research. Alternatively, the generalizability of the information I have obtained from library-based research confirms, corroborates and further expands the breath and range of the research. This said, this section focuses on the methodology of elite interviews, as it is the main empirical strategy employed within the thesis to collect data from the field.

While this thesis is largely based on library research, it was thought that elite interviews with those personnel involved in both the framing of legislation and the operation of the criminal process in China would be useful in understanding the motivations behind the recent reforms of death penalty legislation and the prospects for further changes to law, policy or practice. More specifically, the purpose of this small empirical study was to explore the attitudes, values and beliefs of a group of Chinese elites on the dynamics of death penalty reform in China to reveal 'the ways in which elites form their opinions and positions, and to what extent those positions become reflected in policies and processes'. (Delaney, 2007) My target group of interviewees consists of legislative and judicial elites who are at various levels of these organizations – including the upper echelons - where they may influence policy-making and death penalty reform.

Why Use Semi-structured Elite Interview?

Qualitative interviews help researchers to better understand how a relatively small group of people interpret an event or series of events and act accordingly (Aberbach and Rockman, 2002), having the advantage of flexibility when compared to rigid structured surveys, to gather in-depth data and to be open to alternative ideas. (Bryman, 2008: 439) This is particularly true because elites do not typically like being hemmed in by closed questions (Aberbach and Rockman, 2002: 674), while semi-structured formats provide opportunities for personal interaction between interviewers and interviewees so that any obscurity and misunderstanding can be clarified during the conversation. In my case, due to the sensitivity of the topic of the

Chinese death penalty, I could determine whether the most sensitive questions should be asked, when the appropriate time to ask such questions was, and to what extent the conversation could be pushed forward. Clearly, if interviewers need to exercise discretion in the manner and timing of the conversation, then semi-structured interviews are ideal.

Identifying my Interview Population: Snowball-sampling

There are various ways that ‘elites’ can be defined. The literature on elite interviewing suggests that elites can be defined by the representational indicators’ within a community,¹⁶² by their position,¹⁶³ power,¹⁶⁴ particular expertise, and their role in the policy process and outcomes (Dahl, 1961; Polsby, 1963; Aberbach and Rockman, 2002: 673-676; Peabody et al., 1990; Dexter, 2006). Once the population is defined, the researcher should be able to establish a reasonably representative sample. While this is crucial for quantitative methods – which seek to gather generalizable data about an entire population from a sample of cases (Goldstein, 2002: 669) - qualitative sampling designs lend themselves to more in-depth theoretical understandings of social processes (Faugier and Sargeant, 1997: 791) and so sampling does not need to be so rigorous or precise.

¹⁶² Some scholars link the elite status to ‘representational indicators’ within the framework of a community. See, for example, (Hunter, 1953).

¹⁶³ Bill Gillham defines the term ‘elite’ in ‘elite interview’ as a small number of people who are in a privileged position in an institution or profession, as long as knowledge is concerned. See (Gillham, 2000: 81).

¹⁶⁴ Lilleker defined elites as those with close proximity to power. See (Lilleker, 2003: 207)

In other words, the process of devising a sampling frame and selecting participants in qualitative projects is different in two ways: the researcher does not have a predetermined sample size and the participants do not have to be selected randomly, but can be targeted according to both the information they may be able to provide and their willingness to cooperate.¹⁶⁵ This allows for a technique of ‘snowballing’. Snowball sampling¹⁶⁶ has been employed in my project for a number of reasons. The first is the low visibility of the prospective respondent population and the difficulties of getting their contact information in China. As I explain below, lists and contact information of Supreme People’s Court (hereinafter the SPC) justices and even judges at provincial courts, let alone national legislators, are not readily and publicly available.

The elite status of interviewees is not solely defined by their membership of elite organizations. Ideally, qualified respondents in this project would have expert knowledge about the death penalty but also have real-world experience in its administration or its legislation. Not all members of courts and procuratorates have been legally qualified and there is a large population of ‘administrative leaders’ of courts and procuratorates who are essentially in charge of administrative and political matters in these organizations and its sub-departments. In sum, membership of elite organisations does not necessarily guarantee the status of ‘elite’ in the context of this research. Snowball sampling was therefore extremely useful at mapping out

¹⁶⁵ In quantitative research the researcher has a predetermined number of people as the respondents and they are guided by their desire to select a random sample. See (Kumar, 2011: 312-313).

¹⁶⁶ In snowball sampling, a person, who is identified as a valid member of a specified group to be interviewed, is asked to provide the names of others who fit the requirement. Although this method would hardly lead to representative samples, there are times when it may be the best method available. Snowball sampling is especially useful when you are trying to reach populations that are inaccessible or hard to find. See (Burns, 2000: 389; Trochim, 2006)

relevant populations and gaining access to them (Faugier and Sargeant, 1997: 790) as elites can be elusive.¹⁶⁷

Finally, the political sensitivity of the topic would have deterred many prospective interviewees had they not been approached by one of their own. During the interviews, I repeatedly heard from interviewees that they would not have considered talking to me had it not been for a certain person, who they admired or knew personally, 'sponsoring' or promoting my research. That is why snowballing is especially helpful to gain access to the target population.

But who are the elites for the purpose of this project? My interviewees included people in positions of authority in both judicial and legislative branches who are empowered to influence reform of the death penalty system. Specifically, for instance, at the top hierarchy of the judicial organ, justices or assistant judges from the death penalty division of the Supreme People's Court (which is composed of five adjudication tribunals) in charge of the review of capital cases; at the provincial level of the people's courts, those who have been involved in capital trials and prosecutions are targeted judges for the elite interviews. Only those who had the power and capacity to influence the decision-making process and in particular, who were privy to information that is withheld from others, were considered important to interview.

In total, I interviewed 36 'elites' from both legislature and judiciary in China, mainly during the autumn of 2010. This small-sized sample covered elites in three

¹⁶⁷ For a similar account, see (Denitch, 1972: 152).

institutional areas (procuratorates, courts, and the LACSCNPC) who are decision-makers themselves and those who have the power to possibly influence the decision-making process on the death penalty reform or implementation the key reform initiatives. The details are as follows:

1. *Legislators*, drawn from the Legislative Affairs Commission of the Standing Committee of the National Congress (hereinafter LACSCNPC) - the sole organ in charge of promulgating the draft amendments to the Criminal Law. This turned out to be a surprisingly small number of people.¹⁶⁸
2. *Judges*, including justices from the SPC and judges from the Higher People's Courts of four provinces: Shanghai, He Nan, Hubei, and Guangdong. The judges from the provincial level courts (hereinafter the HPCs) are included given the decentralization of review power over capital cases from the early 1980s to 2007.
3. *Prosecutors*, members of Supreme People's Procuratorate (hereinafter the SPP) and provincial-level people's procuratorates who are familiar with the procedures of instituting legal proceedings in capital cases.

Getting in the Door

Gaining valid and reliable data from elite interviews presents the interviewer with a number of challenges, including establishing rapport with respondents, developing

¹⁶⁸ Since the function of this organization covers a wide range of national legislative matters, and criminal law is just one of them, only a few of the members has expertise and knowledge of the death penalty reform. To reveal the number of people I have interviewed and their job roles will publicise too many details of the identity of these interview subjects. Therefore, I cannot specify more details about the job role and organisations the participants belong to without endangering their anonymity.

sensible questions that will elicit important data without alienating the interviewee, keeping accurate notes without disturbing the flow of the conversation, coding the interview data in an accurate and consistent way, etc. (Goldstein, 2002: 669)

However, these challenges vary as to different types of elite interviews (Delaney, 2007: 211) and across various different cultures¹⁶⁹. The first and foremost obstacle that loomed large in my project was getting access to prospective interviewees.

Unlike the 'surprisingly easy' access enjoyed by scholars in English-speaking jurisdictions of North America, parts of Europe and Australasia (Dexter, 2006: 35; Isaacs, 1958: 29-30; Buchanan et al., 1989: 53-67; Ostrander, 1993), and even non-English speaking European countries, such as Yugoslavia (Denitch, 1972: 146-147), I found gaining access to powerful and busy officials in China the most difficult part of my fieldwork. People in high places in China do not normally stop work to give a stranger an hour to discuss a politically sensitive topic. Such people are hard to find and even harder to secure a meeting with or a phone call, and do not typically grant permission to interview them.

There was always a palpable, strong sense of suspicion and cynicism towards the goals and purposes of my project. Interviewees tended to be withdrawn and reticent when access was initially requested. This seems to be quite different from the standard practice in western liberal democracies, where writing to elites and interviewing them at their workplace is 'perceived as a very typical part of their

¹⁶⁹ Rivera, Kozyreva and Sarovskii pointed out that techniques discussed in most of the literature in advanced industrial democracies are applicable to some extent, but do not always address the difficulties met my researchers in the post-communist world, including Russia. (Rivera et al., 2002: 683).

workplace routine' (Delaney, 2007: 211). Of course, the most important reason for their reticence in this particular project was that the interview topic is not politically 'safe' to discuss in China today. This makes the entire data gathering enterprise profoundly different from the process described in British or American textbooks. Inevitably, I had to adapt the prescriptions in the academic literature and develop different strategies during various stages of the fieldwork process.

Hence, my initial contact with my intended participants did not start with writing introductory letters requesting interviews, followed by phone calls to arrange meetings. This approach is apparently of limited use in China, an example of cultural differences affecting the way interviews are arranged and conducted (Thomas, 1993: 80-96). It was highly likely that letters to central government officials would be ignored, especially if mistaken for correspondence from grass-roots grievance-ridden civilians under the Petitioning (*Letters and Visits*) System¹⁷⁰. Moreover, the mail service in China is highly unreliable. In contemporary Chinese society most job-related interpersonal communications (including private affairs) are done by telephone (landline or mobile), rather than via email or post. This is why I chose to phone or text respondents for the initial contact.

At the exploratory stage of my fieldwork, I wrongly thought that soliciting interviews via the official channels with people in the legislature and judiciary would work. I thought that I could phone those who worked for the SPC, the SPP, and the LACSCNPC, introduce myself to them, and ask if they would agree to take part in

¹⁷⁰ This Petitioning System is known as Letters and Visits, or *Xinfang* or *Shangfang*. See (O'Brien and Li, 2004).

the interviews. There are probably at least three methodological reasons that this could not work as planned.

First, it is impractical to make contact with these nationally or locally influential people without some interpersonal networks or contacts inside the 'circle'. Contact information for those senior civil servants is not publicly accessible in China. Telephone directories are incomplete in each and every one of the websites of the national government branches. The website of some state organs, e.g. the Supreme People's Court, comes with a chart of the organizational structure and a short biography of each chief justice but without contact information for the justices and various departments.¹⁷¹ As for other state organs, e.g. the LACSCNPC, even information regarding the organizational structure is missing, let alone any contact details except a single 'administrative' email address.¹⁷² Therefore it would not be viable to obtain contact information via official channels rather than through interpersonal connections.¹⁷³

Moreover, the SPC, the SPP, and the LACSCNPC are heavily-guarded and do not admit public visitors. Even if I could get past the security guards, given that the elites are always busy, overcommitted, cynical, reluctant, and not in the least deferential toward junior researchers, it would not be easy to persuade them to grant me follow-

¹⁷¹ For names and short bio of chief justices, see <http://www.court.gov.cn/jgsz/zgrmfyld/> (last accessed 2 Dec 2010); for the organizational structure of the Supreme People's Court, see <http://www.court.gov.cn/jgsz/zgrmfyhg/> (last accessed 2 Dec 2010). The only contact telephone numbers listed are 'general enquires' numbers on their website <http://www.court.gov.cn/jgsz/lxfs/> (last accessed 2 Dec 2010).

¹⁷² See http://www.npc.gov.cn/npc/fzgzwyh/node_5854.htm (last accessed 2 Dec 2010).

¹⁷³ In China, interpersonal connections and relationships were found to be more crucial than official channels in obtaining access. (Delaney, 2007: 685; Hsu, 2000).

up interviews. Although some of these state organs have designated public-accessible sites on their websites, these locations are usually in a remote village in the suburbs of Beijing and specifically designed for grief-ridden complainants. In essence, it would be a *mission impossible* to arrange a meeting with important figures using official channels.¹⁷⁴

Third, for a project that has at its core a highly politically sensitive subject, it would take a long time to establish trust and rapport with senior people. No matter how thankful and deferential I was, asking them to do a favour to a stranger with an affiliation to a foreign institution (Oxford University) without established rapport would not likely lead to cooperation. The situation in China appeared to be in sharp contrast to the studies I read about in the western literature, where elites are 'often intellectually interested in the projects', 'readily understand the idea of doing 'academic research'', 'have reliable calendars and schedules' and most importantly, are keen to contribute to the production of knowledge and 'believe that they have important things to say' (Delaney, 2007: 212-213).

My initial failure to persuade powerful people to take part in my interviews suggested that the impact of cultural difference between China and the West should never be underestimated or neglected when conducting social science research on a topic relating to China. I had a 'cultural shock' engaging with my own culture after living

¹⁷⁴ Rivera, Kozyreva and Sarovskii reported that ministerial information centres in Russia were often reluctant to divulge information on their organizational structures, personnel, or contact numbers. See (Rivera et al., 2002: 684) This is also the case in China.

overseas for four years as I had never approached an elite population as an 'outsider', i.e. an overseas trained researcher.

Although it is well-known that interpersonal networking (Guanxi) has been a distinctive characteristic of interpersonal relationships in Chinese society, it surprised me that after going through significant and sophisticated social changes promoted by the economic reforms and the opening-up policy in the past three decades, interpersonal networks still dominate the relationships among elites in the contemporary Chinese society to a great degree, determining the way they behave, communicate and 'do business'. I would not have had such a strong sense of this unique feature of Chinese culture had I not been trained in the West; nor would I have had this awareness if I was not from China. Hence my status as an insider-outsider gave me a unique perspective.

Third, interviewing political and judicial elites in China directly as an 'outsider' would seem to be doomed to failure. The identity of an outsider raises alarms, fears among senior officials and professionals that my study could put their political careers at risk. My experience showed that even if they agreed to participate in the interviews, there was a strong likelihood that they would not deliver on their promise.

For instance, a SPC senior judge, who I met for the first time at an academic conference and who promised to grant an interview, ran away from me after a buffet dinner so fast that I could not catch up with her because I was wearing high heels. A senior judiciary official who initially consented to participate apologized politely to me later the same day and explained that he was leaving for a foreign country on a

business trip for at least two months and thus would not be available to see me.

Further, there were others who initially agreed to an interview but then played hide-and-seek with me every time I called them.

Why were they so uncomfortable about being interviewed? One possible answer is fear that their participation in a sensitive project in the current political environment could jeopardize their political career. And I found that my powers of persuasion were inadequate to the task; once they had refused, there was little or no chance of them reconsidering.

Not to be deterred, I continued to attend academic conferences in order to make further contacts. At a few conferences, my frustration levels rising, I began to ask questions that I had intended for interviews only in the open debates and questions-and-answer sessions. This resulted in palpable hostility among those questioned. Unsurprisingly, this direct approach yielded no returns. One legislator, who was introduced to me by an acquaintance, refused me directly in front of an audience of approximately 60 scholars and practitioners: 'your questions are way out of the boundary of conventional academic researchers. I will not answer your questions at all.' I was firmly put in my place.

Some members of the audience, including Chinese scholars and practitioners who I have managed to connect with or even befriended at the conference expressed sympathy and even solidarity with me, telling me that they too would like to know the answers but that my questions may be too 'bold' to be asked in China. One of them told me that she felt sorry for me and she would love to answer any questions I

asked; she was even willing to disclose to me any relevant data she knew if I want to know. Although I could not interview her because she is not within my sampling frame, the information she provided helped me some unique insight into the regime. One of them told me: 'you guys who are studying abroad behave so differently from us. What are you thinking? He will never answer such questions'. One speaker later approached me to apologize for refusing to answer my questions, saying that they would like to help out, but the Party's rules would not allow them to answer 'sharp' questions like mine, otherwise they may get disciplined by their supervisor/boss.

At this stage, it was clear that my technique was not working, despite my persistence and determination. As a researcher, I belong to a powerless 'status subordinate' (Delaney, 2007: 215; Ostrander, 1993) in the context of these elite interviews.

Apparently, I had no control over whether and how the elites would grant me access. How could I help potential interviewees who are willing to answer my questions to get out of this uncomfortable zone? How could I persuade interviewees to grant me interviews, and yet remain within ethical boundaries?

To date, it seemed that this project would not succeed by my initiatives alone. Given the fact that interpersonal networks - which are so fundamental to Chinese society - require reciprocity and indebtedness among actors, it was evident that a doctoral candidate needed to get referrals and endorsements from influential persons well connected in these networks. I started to seek help from all available sources: well positioned family members, friends, and alumni who have contacts inside the 'circles' that I was trying desperately to break into.

I realized how foolish I had been to not take advantage of these routes of access earlier in the project. I got my family, friends and professors to contact my targeted elites, asking for a personal favour to agree to see me. Their status as ‘legitimizers’ inside the ‘circles’ helped me enormously in setting up interviews with their friends, colleagues and relatives and so on. Hence, I pursued a snowballing sample, making contact with a few individuals, who could then direct me to the other members of the group.¹⁷⁵ Luckily for my project, my choice of individuals at the first stage turned out to have very good connections inside the prospective elite circles.

Deciding How to Present Myself

The issue of how to present oneself as an interviewer is important because it will have an impact on the new (temporary) relationship to be established and influence the research process and outcomes. Since, arguably, the researchers in elite interviews are in a subordinate and relatively weaker position,¹⁷⁶ to gain the trust of the person being interviewed, the researcher needs to find legitimate and acceptable strategies to ‘manipulate’ the interviewees (Cochrane, 1998: 2125). However, the complex relationship between investigator and respondent in qualitative research raises various subtle issues (McCracken, 1988: 25; Cochrane, 1998: 2125-2126;

¹⁷⁵ As the main aim in qualitative enquiries is to explore the diversity, sample size and sampling strategy do not play a significant role in the selection of a sample. If selected carefully, diversity can be extensively and accurately described on the basis of information obtained even from one individual. All non-probability sampling designs, including snowball, can also be used in qualitative research. (Kumar, 2011: 212)

¹⁷⁶ It frequently has been discussed that the power balance is in favour of the respondents in a situation like elite interviewing, where the interviewers request time and expertise from the powerful but with little to offer in return. See (McDowell, 1992; Burnham et al., 2004: 205; Fontana and Prokos, 2007: 61; Leech, 2002). However, a number of researchers suggest that the interviewer is in the more powerful position, both to shape interviews and to write up the results in ways which reflect the researcher’s own preconceptions. See (Cochrane, 1998: 2123; Pile, 1991: 464-467; Lowe and Short, 1990: 7).

Wilson, 1996: 118). The first question is quite straightforward: who do you want the respondents to think you are?

In the context of my research project, linguistic sensitivity played a crucial role in self-presentation management. It appeared that even a subtle difference was capable of complicating my research task. For instance, the term 'interviews' can be translated into different words in Mandarin: 'caifang' (refers to the interviews conducted by journalists) and 'diaocha' (means investigating the answer to a question). It is arguably true that nowadays people in English-speaking North America and Western Europe are living in 'interview societies', involved with all sorts of talk-shows, political journalist reports and so on (Gubrium and Holstein, 2002). Civil servants and other elites are frequently interviewed on controversial issues by academics and by print, radio and television reporters.

However, in China it is still quite rare for social researchers to collect empirical data, including interviews. There has been a high level of suspiciousness, cynicism and even resentment among high-ranked civil servants about journalists, who are those that would likely reveal to the general public phenomena such as corruption, inequality and lack of freedom in today's China. As I initially translated the word interview into 'caifang', potential respondents turned me down because their memories of all the unpleasant experiences with journalists and the unleashed resentments towards them were aroused by this word. It was not until one of the assistants to a legislator told me in person that his 'boss' wouldn't grant me an interview largely because I referred to the research project as a 'caifang' that I realized I had made a mistake. From then on, I used the word 'diaocha' instead to distance

and distinguish myself from journalists, making my research seem more palatable to those elites who typically have vested interests in the survival of the current political regime.

In contemporary Chinese society where the relationship between the ruling class and the general public has a confrontational component, senior civil servants are extremely sensitive to any amount of 'politically incorrect' information that might be disseminated to the general public, might ignite anti-government hostility among people at the bottom of society, and thus render the society 'dangerously unstable'. One of the implications resulting from this observation is that researchers such as myself must be highly alert to any language that may upset the elite respondents and thus frustrate the interview process. This is further complicated by the fact that potential respondents are less familiar with interviews by academic researchers as a means of knowledge-production than elites in western liberal democracies, and tend to assume that they need to be just as cautious about these interviewers as they are about journalists.¹⁷⁷

Another difficulty with self-presentation concerned my own institutional affiliation. Given that most political elites in China, as elsewhere, have a high regard for established figures from renowned academic institutions, I had hoped that my association with the University of Oxford would assure respondents that the research

¹⁷⁷ The fact is that recent years witnessed public servants being frequently punished or disciplined once their scandals, wrongdoings or 'inappropriate' speeches were reported by mass media and enraged the public. The reform of death penalty has been very sensitive recently because the public are in strong disagreement of freeing public servants and in particular public officials who committed bribery and corruption from the punishment of death. Also, there has been a state-imposed secrecy around the topic and thus public servants are concerned that if they talk to a journalist, they will be disciplined by the Party.

was legitimate and valuable and had the potential to contribute to knowledge-production. Indeed, I had presumed that this affiliation would open doors to me, as it would in America, for example. However, it turned out to be a negative association. The more proudly I disclosed my institutional affiliation, the more distrustful the interview subjects seemed to be.

It could be that they were easily alarmed because my affiliation to a *foreign* institution suggested that I may be threatening, foreign, suspicious and ill-intended. This general suspicion of foreigners may be due to the fact that China has been troubled and embarrassed by its negative image on the international human rights stage, where China's high-volume executions in particular have been a frequent target for criticism. Thus the interview subjects were likely to have a hostile and defensive attitude towards someone with an overseas nexus. It could also be that they doubted my ability to maintain promised confidentiality because they felt it difficult to control someone located overseas.

There was not much I could do about their 'foreign affiliation' sensitivity other than finding ways to downplay it a bit. I managed to mention during negotiations for access that I obtained my undergraduate degree and my first masters' degree from Chinese universities before going abroad and that I have every faith in China's legal reform. I emphasized that I was not interested in statistics on executions in China. I fully disclosed my research agenda in an open and honest way, repeatedly assuring prospective interview subjects that my research had been ratified by the ethics committee in my university and I was bound by the rules regarding anonymity and confidentiality. I even went further to put a very rosy outlook on the future reform of

the Chinese death penalty regime: 'look, it will take at least another year for me to finish my thesis, and at the current speed of Chinese legal reforms, who knows what achievements will be made by China then?'

However, my occupational status as a student was quite a different thing: those who I talked with tended to talk more easily after I emphasised my student status.¹⁷⁸

While Oxford was intimidating, and to be treated with extreme caution, a student was clearly not as threatening as another type of interviewer. I decided to turn my student status to my advantage, humbly presenting myself as a young person in the process of writing a thesis, who desperately needs help, who is eager to learn about the legislative or judicial process of China's death penalty reforms. I deliberately tried to appear as non-threatening and non-challenging as possible, in particular when negotiating access.

Despite their initial reluctance to be interviewed, it turned out that just like elites in the western world, political and judicial elites in China actually value research done by scholars, including social scientists. They also tended to respect established scholars and listen to their comments during policy-making processes. Frequently during the interviews I was told that the interviewee would not have agreed to be interviewed without a request from Professor X, his teacher. And quite a few legislators admitted that they had drawn up a reform plan thanks to the intellectual input of certain scholars.

¹⁷⁸ Similar experiences have been reported by Alan Aldridge and S Rivera, P Kozyreva, and E Sarovskii, all of whom claimed that the status of academic researcher foster mutual understanding, facilitated access, rapport and high-quality responses. (Rivera et al., 2002; Aldridge, 1993)

The issue of gender and age is a subtle one. I suspect I was given access and information because of the way I dressed and talked, or because I was a young woman in my twenties¹⁷⁹. As suggested by other researchers,¹⁸⁰ in the eyes of prospective interviewees, my gender and age might well have made me more vulnerable, intriguing, considerate, warm and empathetic, and – in this context in particular - non-threatening. However, the role of gender and age were less significant than my contacts. The most crucial variable for securing interviews was clearly my endorsement by those with whom they had a connection or whom they respected.¹⁸¹

Developing an Interview Guide and Formulating Interview Questions

The interview guide serves as a framework to provide a preview of the key questions/topics to help put the interviewees at ease (Arksey and Knight, 1999: 97-98). In order to set out the parameters of the study and to allow the subjects of the interview to quickly grasp the relevance of the project, I categorized my respondents into two groups: members of the legislative and judicial branches (courts and procuratorates) and provided each group with a copy of the interview guide in

¹⁷⁹ Male respondents account for the most majority (approximately 83.33%) of the total number respondents in my research.

¹⁸⁰ Schoenberger commented that she possibly had an easier time getting in the door than a male colleague was probably because of her gender. See (Schoenberger, 1992: 217-218). Cochrane also thought his younger woman colleague who interviewed the same people as himself had an easier time getting in the door. See (Cochrane, 1998: 2126).

¹⁸¹ Although claiming that age and gender were ‘important variables’, Cochrane conceded that this reflected inbuilt social relations and assumptions which in other circumstances one would have wanted to challenge. (Cochrane, 1998: 2126)

advance. My interview guide included a written overview containing the following itemized information and a set of 10 topics that I invited respondents to discuss:

- the name of the study
- my name, institution and contact details
- a brief rationale for the study, including its nature, purpose and value
- an explanation of why the individual is being invited to take part in the research, and that he/she will be asked over the phone to answer a list of questions similar to the topics listed in the interview schedule, making clear that it would take approximately 30 minutes to an hour to complete
- a promise that the project will not violate legal, professional or ethical rules, in particular that the project has received ethics clearance through the University of Oxford's ethical approval process for research involving human participants
- a promise of strict confidentiality across all stages of interviews and anonymity in publications
 - assurances about confidentiality in using the data (that the data will solely be used for the purpose of my project) and that at the end of the study further consent will be sought in case of publication in China
 - assurances about anonymity of the data

My exploratory interviews showed the importance of not only asking the right questions, but also asking them in the correct manner so that interviewees' trust is gained and rapport established. Whether or not these interview questions are put in

an optimal order, therefore, can significantly affect the level and quality of information obtained during an interview. Based on my experience, there are at least three ways to achieve the best results.

First, setting the right tone at the very beginning will send strong signals to the interviewees that the conversation will be rewarding and pleasant and thus more useful, honest responses will be elicited from the interview. The rule of thumb, as findings from earlier studies concluded (Barbour, 2008: 115; Arksey and Knight, 1999: 98), is to start with the least threatening questions ('ice breaker' or 'easy-to-answer' questions) and to move gradually to those difficult, intrusive, sensitive and probing questions. A reverse order of question arranging usually turned out to be disastrous. When I asked sensitive questions at the beginning of the interview, it sometimes caused my interviewees to act defensively and withhold information.

In my case, the first question was intended to focus on the considerable achievements by China's death penalty reform over recent years, as these questions set a friendly, almost congratulatory tone. Follow-up questions related to the general background or factual aspects of the reform, which could be seen as 'neutral' and 'non-sensitive' topics. They also provided some information to show that I had prepared well for the interview and knew of the recent reforms.

Questions regarding weaknesses in criminal procedures were saved for later stages of the interview when trust should have been built up between me and the respondents so that they felt less threatened by sensitive topics. By this stage, they often seemed more relaxed and chatty, and more willing to provide in-depth information. An

alternative approach I sometimes adopted was to shuttle between easy questions and 'annoying' questions to facilitate a comfortable atmosphere in general and a seamless progression that worked for the interviewee.

Second, it has been widely recognized that even slight question-wording differences can yield remarkably differing results in *surveys* (Schuman and Presser, 1977; Walby and Myhill, 2001; George F. Bishop et al., 1978). It was my experience and impression that variations in questions can be influential in *interview* scenarios as well. For instance, when I framed my question 'What do you think are the deficiencies in the current capital judicial proceedings?', one interviewee refused to answer and told me that if I want an answer, he thought that there were no deficiencies in the proceedings at all, that the administration of capital punishment in China was flawless. However, after I reframed my question 'what improvements could be done to the capital judicial proceedings in the future?' he let his guard down and opened-up to me.

Third, skills for controlling the conversation progress, 'knowing when exactly to prompt and when to leave room for the interviewee to mull over the question raised' (Barbour, 2008: 114) are no less important when conducting elite interviews. Asking open-ended questions, according to Jeffrey Berry, is a high wire adventure - both the riskiest and potentially the most valuable in eliciting rich data (Berry, 2002: 679). Interviewers need to be prepared to know when to probe and how to formulate

follow-ups to the general questions in order to push the conversation deeper,¹⁸² especially when the interviewer is taken down an unanticipated path and eager to bring the topic back on track (Berry, 2002: 679-681).

In general, it is a matter of personal judgement for the interviewers as to when and what additional questions to ask to elicit more pertinent information. As mentioned above, I had prompts and follow-up questions under each of the general headings in my *aide-memoir*. I found these reminders very helpful, to prompt the interviewee to provide further thoughts when cautious and reluctant to provide in-depth and sensitive information, to refresh their memories when they are unsure about which topics to cover, but also to manage awkward silences that can occur when the interviewee is not well-prepared to answer these complicated questions.

As my experience grew, I gradually came to a clear sense of which questions tended to yield sufficiently substantial in-depth answers, which needed more follow-up questions to get precise and clear responses, which were normally responded to with short answers, and which required longer explanations. This helped me to make informed decisions in managing conversation flows more efficiently under limited time constraints. It became normal to alter the order of questions as the session progressed in the interview, in order to make interviewees feel more comfortable if they chose to skip a topic and then circle back later to form a logically coherent conversation.

¹⁸² A useful mantra may be: 'Fewer Questions; Better Probes!' See (Delaney, 2007: 210). In semi-structured interviews researchers are advised to probe and prompt informants' responses in order to seek further elaboration, clarification, specific examples and so on. See (Arksey and Knight, 1999: 97).

Why Conduct Telephone Interviews?

All of my interviews were conducted via telephone, although some of the exploratory interviews were carried out face to face and sometimes I was able to meet with the respondents and chat about the subject after the telephone interviews. While I was in no doubt that face-to-face interviews would be the best way to conduct this research, this proved to be difficult, if not impossible as the 'elites' I wanted to talk to did not want to be interviewed in this way.

Indeed, telephone interviews have their own advantages (Shuy, 2002: 538; Hagan, 1997: 168) as they can save interviewers the difficulties of being limited to interviewing at a specific time and place and they are less resource intensive.

Although non-verbal cues such as facial expressions and body language cannot be spotted during telephone interaction, attention can be paid to silence and pauses in the conversation as well as to the tones and voice mannerisms. Additionally, the interviewer may have an easier time taking notes while the interviewees talk because the invisibility offers the privilege of not worrying about eye-contacts, nodding and other facial expressions as well as body language, which are all a feature of face-to-face conversations.

However, the main advantages for me were that without resorting to telephone interviews I would have missed out on most interviews because my respondents' busy schedules would not have allowed for face-to-face contact. Further, for many interviewees I had only telephone contact details and some I could not have

interviewed any other way once I had left China to return to Oxford. Additionally, since I interviewed respondents who were widely dispersed in China (both in the capital and four other provinces outside of Beijing), interviewing by telephone proved to be the most cost-efficient way to conduct the research. Last but not least, for a project focused on a politically sensitive topic with nervous respondents, the distance and lack of intimacy found in telephone interviewing made my respondents more comfortable.¹⁸³ As my interviews lasted between thirty minutes and an hour, my experience suggests that telephone interviewing can generate detailed and considered replies.

Recording Interviews Digitally

Audio-recording interviews are useful in qualitative research because it permits a closer and less subjective *ex post* examination of the interviewer-interviewee interaction: researchers are interested not just in what people say but also in the way that they say it.¹⁸⁴ However, recording interviews digitally also has various disadvantages and there are occasions when audio-recording is not an option at all. For instance, recording equipment may be off-putting for interviewees and the procedure of transcribing and analysing complete interview data can be extremely time-consuming. In my project, no respondent would be willing to consider the use of audio-recording devices even with assurances of strict anonymity and

¹⁸³ Bryman commented that asking sensitive questions by telephone may be more effective because interviewees may be less distressed about answering when the interviewer is not physically present. See (Bryman, 2008: 457).

¹⁸⁴ The procedure of recording and transcribing has the following advantages: it helps to obtain the raw data for later study; it helps to correct the natural limitations of our memories and of the intuitive glosses that we might place on what people say in interviews; it allows more thorough examination of what people say; it permits repeated examinations of the interviewee's answers; it opens up the data to public scrutiny by other researchers etc. See (Burns, 2000: 429; Bryman, 2008: 451; Dexter, 2006: 56).

confidentiality. Certain interviewees kept warning me that the entire process must be 'off the record' and even threatened that things 'will get nasty' if any of our conversation was reported in the media.

As mentioned above, the most obvious reason for the elite respondents' reluctance to have their responses recorded was the political sensitivity of the topic and the political environment for civil servants in China. Their unfamiliarity with the role of social scientists and false association of social scientists with journalists has further complicated the situation. Moreover, they may doubt my ability to maintain anonymity and confidentiality, although due to ethical considerations I was obviously unwilling to use covert recording devices.

As audio-recording devices could not be used, I chose to take written notes as close to verbatim as possible on my laptop during the interview. These 'simultaneous notes' thus represent a near to complete account of the series of exchanges and conversations. Not only do they include the substance of the dialogue, but they also incorporated nuances and turns of phrase which suggest relationships and attitudes, and my personal observations of reluctance, hesitation, pauses, etc. Although it turned out to be challenging to take notes while being alert to what was said,¹⁸⁵ I think I coped reasonably well.

¹⁸⁵ Dexter doesn't believe in taking verbatim notes considering the speed with which many interviewees speak and the number of unfamiliar conceptions they introduce. See (Dexter, 2006: 55). However, I didn't even find it difficult to do so. For one, I was quite familiar with various conceptions the interviewees mentioned in the talk. I haven't met a single interviewee who introduced unfamiliar conceptions or terms. For the other, with the distance in space from intimacy found in telephone interviewing, interviewees tended to slow down a little bit and there was less distraction such as nodding heads, putting on a look of interest, smiling etc. Hence focusing on note-taking was much easier. All I had to do was listen, taking

'To Believe or Not to Believe': Pursuing the 'Truth' and Reading Between the Lines

The inclination of elites to not tell the 'objective truth' is widely acknowledged in the existing literature. They tend to speak for the 'official stances' of their organizations (Ostrander, 1993; Thomas, 1993; Delaney, 2007: 223); they emphasize some things and neglect others (Berry, 2002; Lilleker, 2003: 207; Richards, 1996); they use interviews to get arguments and views across, to convey a particular version of events, to deride or displace other interpretations and points of view (Ball, 1994: 97-98), and to 'cultivate a gray anonymity combined with a reluctance to express any independence or original views' (Denitch, 1972: 155). My experience showed that this 'spokesperson problem' is even more prevalent among policy decision-makers in China.

My first experience involved an initial 'field-mapping' expedition for my current project. By attending conferences and workshops in China, I was hoping to establish the appropriate sampling frame before starting the actual interviews. I was fortunate enough to be the translator for a leading European scholar, Professor H, who tried to get the true views of a SPC judge (Judge G) underlying his 'official' stance on China's implementation of ICCPR. (Judge G had earlier declared in his formal presentation that China had been able to meet all its obligations under the ICCPR in full and with promptness. Apparently, that was not the truth.)

notes, asking the questions, and giving encouraging short comments such as 'that's insightful', 'good point', 'excellent', and even 'uh-huh'.

Professor H ‘cornered’ Judge G after one session of the workshop in order to ask him whether *he* thought that China had lived up to its international obligations under the ICCPR in administering the death penalty. I translated Professor H’s question for Judge G, who responded: ‘yes, *I think* China has lived up to its legal obligations indeed’. Professor H asked him the same question a second time: ‘do *you truly* believe that China has lived up to all its ICCPR obligations?’ This time, Judge G seemed a little embarrassed, he paused and answered hesitantly: ‘yes, well, *I guess* China has lived up to its legal obligations’.

Determined to get the *true* answer, Professor H told me to translate for him again the same question for a third time. Judge G started blushing and sweating, he tried to hide his nervousness and embarrassment by changing the conversation to the topic of China’s recent development in implementing the ICCPR (Clearly, he would have run away from Professor H if he could, but unfortunately for him, Professor H had blocked his exit route). An unremitting Professor H interrupted him and asked the question once again. It appeared to me that Judge G did not want to refuse to answer the question (or perhaps he did not know how to refuse such a persistent foreign scholar); meanwhile, as a government-appointed legal elite, he was worried about saying anything inconsistent with the official position of the Chinese government (that the provisions of the ICCPR have been fully honoured in China). After a while, he reluctantly admitted that China had not lived up to all its international obligations under the ICCPR. The truth had come out, albeit perhaps at some personal cost to wellbeing of the official subject to academic interrogation.

Another story involves my participation in several workshops and conferences for criminologists and criminal law researchers in China. I had noticed the differences in ‘performance’ by senior civil servants and intellectuals at front-stage and backstage, depending on the environment and audience.¹⁸⁶ Civil servants preferred to paint a rosy picture (e.g. announcing the achievements of the government and possible benefits to the public in a most optimistic tone) while they conveyed the official stance of the government to the public at front-stage. While behind closed doors (for instance, during an invitee-only secret round-table discussion), they were more likely to reveal their real thoughts (e.g. that the radical reform measures had generated some anti-government public sentiments and thus would be detrimental to social stability).

These experiences highlighted the difficulty of eliciting the real ‘personal opinions’ of Chinese elites. Why is it so? These elites may find it hard to escape from the political pressure that they need to tell the ‘official story’, or perhaps they can barely distinguish their own positions from the official standpoint after being the mouthpiece of the government for a few years. Given the inevitability of subjectivity in elite interviews, there is a danger in believing that the responses are true simply because the elites tell me so. It is important not to pretend that there is some stable objective truth out there and to keep self-critical, reflexive and sceptical (Cochrane, 1998: 2130).

¹⁸⁶ Similar observations have been reported by western scholars. See (Goffman, 1959; Goldstein, 2002: 671; Hunter, 1995: 154).

There are a number of strategies available here to cope with the challenge of getting honest accounts. Some simple ones, as mentioned above, include moving from non-threatening questions to threatening ones (Leech, 2002: 665-680; Lilleker, 2003). Another strategy I found helpful was to go a layer deeper by asking 'interpreting questions' such as: 'Do you mean that you personally think that this is the weak link of the trial process in capital cases?'; 'Is it fair to say that what you are suggesting is that based on your experience Chinese characteristics do not involve political elements?' Sometimes interviewees would delve deeper into the question and give me their personal perceptions by saying 'well, personally, I think that...'. And this was exactly why I had chosen semi-structured interview questions in the first place: to give the respondents the opportunity to articulate their true opinions.

At other times, however, they would insist on being the 'spokesperson' of the government by only telling the official story; or alternatively, they would tell the official story but insist that it was their personal opinion. Under such circumstances, there was little I could do except try to distinguish their 'professional' responses from their personal perceptions when analysing the data by finding information hidden between the lines.

For this purpose, it is crucial to retain a form of committed scepticism but nevertheless take seriously the stories of the elites in their own right. And finally, the rule of thumb is to put the research project against the backdrop of broader social processes and structures to provide an analytic interpretation of the interview responses (Cochrane, 1998: 2129-2131).

Review of Databases

Apart from elite interviews, I have also conducted extensive review of databases and literature on China's use of capital punishment in both English and Chinese. In particular, in order to obtain first hand materials and information in Chinese, I have mainly consulted four databases: China Data Online, China Core Newspapers Database, People's Daily current, and People's Daily archive, all of which are accessible from SOLO – the online library platform of the University of Oxford. A subset of China Data Online –Yearbook database – contains two sets of data which are relevant to my studies: China Statistical Yearbook and China Social Statistical Yearbook. I have used these datasets for officially-released figures such as the number of criminal cases heard by different levels of courts in China, the content of the SPC's annual reports, the incidence of crimes as recorded by the police, the procuratory and the courts, etc. I have also used the biggest database of Chinese law – <http://www.lawyee.net/index.asp> – to supplement and verify the information I have obtained from the two yearbooks. I have used the other three databases available from SOLO – China Core Newspapers Database, People's Daily current, and People's Daily archive – to locate news reports about China's use of capital punishment.

Conclusion

The negotiation of access to elite groups not only influences the processes and outcomes of interviews, but also says a great deal about the society in which the interviews are undertaken: the relative status of social scientists in the society, the rules of the game necessary to get past the gatekeepers, the approximate division of

power within the various sectors and institutions of the society, and the attitude of elites towards social science in general and survey research in particular (Denitch, 1972: 143).

The huge reluctance of political and judicial elites to grant access and the difficulties in overcoming such reluctance in my project suggest that they are not familiar with the types of interviews conducted by social scientists; neither have they fully appreciated the substantial contribution of interviews to social science and knowledge-production. One of the more important implications, however, is that the subject of the death penalty, partly because of its close affinity to human rights discourses, has been deeply entangled in all sorts of political-cultural considerations. This necessitates social science researchers working on this subject to move beyond their cynicism towards the methodological challenges to grapple with some of the complex and profound dimensions and characteristics of Chinese society and the role of the death penalty within it.

Interview Questions

(Chapter One)

For Interviewees who are Legislators:

1. Following an introductory description of the considerable reforms in the death penalty legislation: In general, what do you think promoted China's death penalty reform this century?
2. Why has the Chinese government promulgated the 8th Amendment to the Chinese Criminal Code?
 - Why were the 13 offences removed?*
 - Why have the elderly as a group been excluded from execution?*
 - What are the practical significances of this amendment?*
3. Is there any possibility of further restricting the number of capital offences in the near future?
 - Are there any possible legislative changes to death-eligible offences such as robbery, rape, murder and drug offences?*
4. In your opinion, what is the relationship between the legislature and judiciary in reforming the death penalty system?
5. Based on your personal experience, what are the main factors that influence the judicial decision-making process?
6. What is the role of international human rights standards in shaping the landscape of Chinese death penalty?
 - Could you talk more about your personal opinion / attitudes toward international human rights movements?*
 - What do you think of the super due-process of capital case proceedings in America?*

7. What sort of meaning does the word ‘Chinese Characteristics’ and ‘Chinese National Situation’ have for you?

Probe answer for examples, more specifically, which dimension of social structure does the word refer to?

8. What is the impact of public opinion on the death penalty administration?

How do you weigh public opinion?

Through what channels you get to know them?

In what way should public opinion influence the trial of capital cases?

9. What are the practical significances of recently-promulgated sentencing guidelines and evidentiary rules?

10. What are the challenges in implementing the death penalty reforms?

Could you please let me know if there is anything else that I should have covered in this set of questions?

For Interviewees who are Judges or Prosecutors:

1. (A blurb that China has achieved a lot its death penalty reform recently) In general, what do you think promoted China’s death penalty reform this century?

2. Why has Chinese government promulgated the 8th Amendment to the Chinese Criminal Code?

Why the 13 offences were removed?

Why the elderly as a group has been excluded from execution?

What are the practical significances of this amendment?

3. Why the SPC recalled of review power in capital cases in 2007?

Why did the review power was delegated to local courts in the 1980s?

What are the changes that the recall of review power has brought?

Any challenges for the SPC during the transition period?

4. What are the practical significances of recently-promulgated sentencing guidelines and evidentiary rules?
5. Based on your personal experience, what are the main factors that influence the judicial decision-making process?
6. What is the role of international human rights standards in shaping the landscape of Chinese death penalty?

Could you talk more about your personal opinion / attitudes toward international human rights movements?

What do you think of the super due-process of capital case proceedings in America?

7. What sort of meaning does the word 'Chinese Characteristics' and 'Chinese National Situation' have for you?

Could you please give me an example in relation to the capital trial?

More specifically, which dimension of social structure does the word refer to?

Is that the way you personally feel?

8. What changes have been brought by initiating open-court trials in the second instance?

Could you please comment on any aspects of the trial procedure in capital cases that needs improvement?

9. What is the impact of public opinion on the death penalty administration?

How do you weigh public opinion?

Through what channels you get to know them?

In what way should public opinion influence the trial of capital cases?

10. What are the challenges in implementing the death penalty reforms?

Could you please let me know if there is anything else that I should have covered in this set of questions?

Table 2.1 Capital Offences in Various Imperial Penal Codes

(Chapter Two)

Imperial Codes of Major Dynasties	Offences by Various Execution Methods	Total of offences legally punishable by death
Tang Code (653)	Strangulation: 144 offences and decapitation: 89 offences	653
Sung Code (963)	Strangulation and decapitation	293
Yuan Code (1277)	Death by Slicing: 9	135
Ming Code (1397)	Immediate Decapitation: 38 Immediate Strangulation: 13 Decapitation after Assizes: 98 Strangulation after assizes: 87 Slicing: 13 Miscellaneous: 13 Recorded in Sub-statues: 20	249
Ch'ing Code (1740)	Immediate Decapitation: 222 Immediate Strangulation: 71 Decapitation after Assizes: 218 Strangulation after Assizes: 272 Slicing 30	813

	Miscellaneous: 12	
The New Penal Code of the Great Qing (1911)	Strangulation: 20	20

Source: Kim and Leblang, The Death Penalty in Traditional China (1975) 5. Ga.J.Int. & Comp.L.

89-90

Table 2.2: Capital Offences in Various Chapters of the 1979 Criminal Law

(Chapter Two)

Chapters	Articles	Capital Offences	The Number of Capital Offences in Each Chapter	Percentage of Capital Offences in Each Chapter
Chap I: Crimes of Counterrevolution	91、 92、 93、 94、 95、 96、 97、 100、 101、 103 (10 articles)	Art. 91-Treason Art. 92- Conspiring to Overthrow the Government Art. 92- Conspiring to Splitting the State Art. 93- Instigating Mutiny Art. 93- Instigating Riots Art. 94-Defection to the Enemy Art. 94-Mutiny Art. 95- Gathering a Crowd for Armed Rebellion Art. 96-Gathering a Crowd to Raid the Prison Art. 96-Organizing a Prison Break Art. 97-Espionage Art. 97-Aiding the Enemy	15	53%

		Art. 100- Counterrevolutionary Sabotage Art. 101- Counterrevolutionary Murder Art. 101- Counterrevolutionary Injury		
Chap II: Crimes of Endangering the Public Security	Art. 106 Art. 110 (2 articles)	Art. 106-Arson Art. 106-Breaching Dikes Art. 106-Causing Explosions Art. 106-Poisoning Art. 106-Endangering Public Security with dangerous methods Art. 110-Sabotaging Transportation Instruments Art. 110-Sabotaging Transportation Facilities Art. 110-Sabotaging Electric Power and Gas Facilities Art. 110-Sabotaging Inflammable or Explosive Equipment	8	29%
Chap III: Crimes of	0	0	0	0

Disrupting the Order of Socialist Market Economy				
Chap IV: Crimes of Infringing upon the Citizen's Personal or Democratic Right	Art. 132 Art. 139 (2 Articles)	Art. 132-Murder Art. 139- Rape Art. 139- Statutory Rape	3	11%
Chap V: Crimes of Encroaching on Property	Art. 150 Art. 155 (2 Articles)	Art. 150- Robbery Art. 155- Corruption	2	7%
Chap VI: Crimes of Disrupting the Order of Social Administration	0	0	0	0
Chap VII: Crimes Disrupting Marriage and the Family	0	0	0	0
Chap VIII: Crimes of Dereliction of Duty	0	0	0	0

Table 2.3: Capital Offense in Various Chapters of the 1997 Criminal Law

(Chapter Two)

Chapters	Articles	Capital Offences	The Number of Capital Offences in Each Chapter	Percentage of Capital Offences in Each Chapter
Chapter I: Crimes of Endangering the State Security	102、 103、 104、 108、 110、 111、 112 (7 articles)	Art. 102-Treason Art. 103- Dismembering the Nation Art. 104-Armed Rebellion or Riot Article 108-Defecting the Enemy and Turning Traitor Art. 110-Espionage Art. 111- Stealing, Spying on, Buying or Illegally Providing State Secrets or Intelligence for An Agency or Organization or People Outside China Art. 112-Aiding the Enemy	7	10.29%
Chapter II: Crimes of Endangering the Public Security	115、 119、 121、 125、 127 (5 articles)	Art. 115-Arson Art. 115-Breaching Dikes Art. 115-Causing Explosions Art. 115-Poisoning Art. 115-Endangering Public	14	20.59%

		<p>Security with dangerous methods</p> <p>Art. 119-Sabotaging Transportation Instruments</p> <p>Art. 119-Sabotaging Transportation Facilities</p> <p>Art. 119-Sabotaging Electric Power Facilities</p> <p>Art. 119-Sabotaging Inflammable or Explosive Equipment</p> <p>Art. 121-Hijacking an Aircraft</p> <p>Art. 125-Illegally Manufacturing, Trading, Transporting, Posting or Storing Guns, Ammunition or Explosives</p> <p>Art. 125- Unlawfully Buying, Selling, Transporting and Storing Hazardous Substance*</p> <p>Art. 127- Stealing or Forcibly Seizing Guns, Ammunition, Explosives or Hazardous Substance**</p> <p>Art. 127- Robbing Guns, Ammunition or Explosives</p>		
Chapter III: Crimes of Disrupting the Order of Socialist Market Economy	141、144、 151、153、 170、199、	<p>Art. 141- Producing or Sells Fake Medicine</p> <p>Art. 144- Producing or Selling Toxic or Harmful Food</p>	15	22.06%

	<p>205、206 (8 articles)</p>	<p>Art. 151- Smuggling Weapons and Ammunition</p> <p>Art. 151- Smuggling Nuclear Materials</p> <p>Art. 151- Smuggling Counterfeit Currency</p> <p>Art. 151- Smuggling Cultural Relics</p> <p>Art. 151- Smuggling Precious Metals</p> <p>Art. 151- Smuggling Precious and Rare Species of Wildlife and the Products Thereof</p> <p>Art. 153- Smuggling Ordinary Goods or Articles</p> <p>Art. 170- Counterfeiting Currency</p> <p>Art. 192- Unlawful Fund-raising Fraud</p> <p>Art. 194- Financial Instrument Fraud</p> <p>Art. 195- Letter of Credit Fraud</p> <p>Art. 205- Falsely Issuing Value-added Tax Invoices or Any Other Invoices for Obtaining Fraudulently Tax Refunds On Exported Items or Tax Deduction</p> <p>Art. 206- Counterfeiting Value-</p>		
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		added Tax Invoices or Sells Counterfeited Value-added Tax Invoices		
Chapter IV: Crimes of Infringing upon the Citizen's Personal or Democratic Right	232、 234、 236、 239、 240 (5 articles)	Art. 232- Murder Art. 234- Mayhem Art. 236- Rape Art. 236- Statutory Rape *** Art. 239- Kidnapping Art. 240- Abducting Women and Children	6	0.09%
Chapter V: Crimes of Encroaching on Property	263、 264 (2 articles)	Art. 263- Robbery Art. 264- Theft	2	0.03%
Chapter VI: Crimes of Disrupting the Order of Social Administration	295、 317、 328、 347、 358 (5 articles)	Art. 295- Imparting Methods of Crime Art. 317- Prison Break by insurrection Art. 317- Gathering a Crowd to Raid a Prison Using Instrument Art. 328- Excavating and Robbing Ancient Cultural Remains or Ancient Tombs Art. 328- Excavating and Robbing Ancient Fossils of Ancient Human Being or Ancient vertebrates Art. 347- Smuggling, Trafficking in, Transporting or Producing	8	11.76%

		Drugs Art. 358-Organizing Prostitution Art. 358-Coercing Prostitution		
Chapter VII Crimes of Endangering Interests of National Defence	369、 370 (2 articles)	Art. 369-Damaging Weapons or Equipment, Military Facilities or Military Communications Art. 370- Knowingly Supplying the Armed Forces with Defective Weapons or Equipment or Military Facilities	2	0.03%
Chapter VIII Crimes of Embezzlement or Bribery	383、 386 (2 articles)	Art. 383-Corruption Art. 386-Bribery	2	0.03%
Chapter IX Crimes of Dereliction of Duty	0	0	0	0.00%
Chapter X Crimes of the Serviceman's Violation of Duty	421、 422、 423、 424、 426、 430、 431、 433、 438、 439、 446 (11 articles)	Art. 421- Disobeying An Order During Wartime Art. 422-Concealing or Making a False Report of Military Intelligence Art. 422-Failure to Convey Military Orders or Conveying Fraudulent Military Orders Art. 423-Surrendering to the Enemy Art. 424-Desertion In Time of War Art. 426-Obstructing the	12	17.65%

		<p>Execution of Military Duties</p> <p>Art. 430-Disertion and Defection as A Serviceman***</p> <p>Art. 431-Stealing, Prying, Buying, Unlawful Obtaining Military Secrets for Organizations, Institutions and Personnel outside Mainland China</p> <p>Art. 433-Fabricates Rumour to Mislead Others In Time of War*****</p> <p>Art. 438-Stealing or Seizing by Force Weapons or Equipment or Military Materials</p> <p>Art. 439- Unlawfully Selling or Trading Weapons or Equipment of the Army</p> <p>Art. 446-Maltreatment towards Innocent Residents or Pillaging Property from An Innocent Resident in Time of War</p>		
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* This crime was originally named as Illegally Trading or Transports Nuclear Materials in 1997 Criminal Law. Article 5 of the Amendment to the Criminal Law and *The Supplemental Regulation about the Name of Crimes* issued by the SPC and the SPP on 26 March 2002 revised the above mentioned the name of the crime to Unlawfully Buying, Selling, Transporting and Storing Hazardous Substance.

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** This crime was originally named as Illegally Stealing or Forcibly Seizing Guns, Ammunition, or Explosives in 1997 Criminal Law. Article 6 of the Amendment to the Criminal Law and *The Supplemental Regulation about the Name of Crimes* revised the above mentioned the name of the crime to Stealing or Forcibly Seizing Guns, Ammunition, Explosives or Hazardous Substance.

*** Statutory Rape which was provided in the 1997 Criminal Law was officially abolished by *The Supplemental Regulation about the Name of Crimes*. Criminal conducts which were previously considered Statutory Rape became a category of Rape.

**** The death penalty is applicable if the serviceman drives an aircraft or warship to flee from China or has any other extremely serious circumstances.

*****The death penalty is applicable if extremely serious circumstances are involved.

Table 3.1 Main Regulations Issued During the Death Penalty Reform (2006-2010)

(Chapter Three)

Notice on Issuing the Provisions on Several Issues of Analysing and Screening Evidence in Capital Cases	the Supreme People's Court the Supreme People's Procuratorate the Ministry of Public Security the Ministry of State Security the Ministry of Justice	13 June 2010
Provisions on Several Issues of Excluding Illegal Evidence in Criminal Cases	the Supreme People's Court the Supreme People's Procuratorate the Ministry of Public Security the Ministry of State Security the Ministry of Justice	13 June 2010
Provisions on Implementing Procedures for Suspending the Execution of Death Penalty	the Supreme People's Court	15 December 2008
Several Provisions on Fully Guaranteeing Defence Counsels' Legal Role to Ensure the Quality of Capital Adjudication	the Supreme People's Court the Ministry of Justice	21 May 2008
Notice on Issuing Guidance on Strengthening Handling Cases in Strict Accordance with Law and Guaranteeing the Quality of Handling Death Penalty Cases	the Supreme People's Court the Supreme People's Procuratorate the Ministry of Public Security the Ministry of Justice	03 September 2007
Notice to Publish the "Opinions on	the Supreme People's Court	09 March 2007

Ensuring Sentencing in Strict accordance with Law and Guaranteeing the Quality of Capital Cases	the Supreme People's Procuratorate the Ministry of Public Security the Ministry of Justice	
Provisions on Several Issues Concerning the Review of Death Penalty Cases	the Supreme People's Court	27 February 2007
Decision on the Exclusive Exercise of the Power to Review Death Penalty Cases	the Supreme People's Court	28 December 2006
Provisions on Some Issues concerning the Court Trial Procedures for the Second Instance of the Cases Involving Death Penalty (for Trial Implementation)	the Supreme People's Court	21 September 2006
Official Reply on the Issue of How to Determine Time Period for Death Sentence with A Suspension of Execution	the Supreme People's Court	05 November 2002

Table 3.2 Published Caseloads of the SPC and Lower-level People's Courts

Nationwide (1980-2011)

(Chapter Three)

Period	The SPC's Annual Total Caseload	The SPC's Annual Criminal Caseload	Nationwide Criminal Caseload
2010	10,626 (accepting 12,086 cases)	#N/A	779,641
2009	11,749 (accepting 13,318 cases)	#N/A	767,000
2008	7725 (accepting 10,553)	#N/A	768,130
2007	7,077	3,212	623,093
2006	3,668	405	701,784
2005	3,196	445	684,442
2004	2,923	400	644,648
2003	3,587	300	735,835

Sources: Work Reports of the National People's Court (1980-2011)

Table 3.3: Official Statistics on Chinese Criminal Cases and Incidence of Crime

(1977-2010)

(Chapter Three)

Year	Total Number of Record Cases			Punishment > 5 years	Population (unit: 10,000)	Crime Rate (per 10,000 People)			
	Police	Courts	Procuracy			Police	Courts	Procuracy	Heavy Punishment
1977	548415	205321	#N/A	#N/A	94974	5.8	2.2	#N/A	
1978	535698	146968	#N/A	#N/A	96259	5.6	1.5	#N/A	#N/A
1979	636222	123846	#N/A	#N/A	97542	6.5	1.3	#N/A	#N/A
1980	757104	197856	#N/A	#N/A	98705	7.7	2.0	#N/A	#N/A
1981	890281	232125	#N/A	#N/A	100072	8.9	2.3	#N/A	#N/A
1982	748476	245219	#N/A	#N/A	101654	7.4	2.4	#N/A	#N/A
1983	610478	542648	#N/A	#N/A	103008	5.9	5.3	#N/A	#N/A
1984	514369	431357	#N/A	#N/A	104357	4.9	4.1	#N/A	#N/A
1985	542005	246655	#N/A	#N/A	105851	5.1	2.3	#N/A	#N/A
1986	547115	299720	257219	96477	107507	5.1	2.8	2.4	2.4
1987	570439	289614	240958	781864	109300	5.2	2.6	2.2	2.2
1988	827594	313306	262896	113533	111026	7.5	2.8	2.4	2.4
1989	1971901	392564	340992	165262	112704	17.5	3.5	3.0	3.0
1990	2216997	459656	385903	215350	114333	19.4	4.0	3.4	3.4
1991	2365709	427840	347770	184334	115823	20.4	3.7	3.0	3.0
1992	1582659	422991	330604	172459	117171	13.5	3.6	2.8	2.8
1993	1616879	403267	317384	173879	118517	13.6	3.4	2.7	2.7
1994	1660734	482927	385271	208267	119850	13.9	4.0	3.2	3.2
1995	1690407	495741	385372	219922	121121	14.0	4.1	3.2	3.2
1996	1600716	618826	445507	265293	122389	13.1	5.1	3.6	3.6
1997	1613629	436894	360696	109559	123626	13.1	3.5	2.9	2.9
1998	1986068	482164	403145	#N/A	124761	15.9	3.9	3.2	3.2
1999	2249319	540008	464784	#N/A	125786	17.9	4.3	3.7	3.7
2000	3637307	560432	480119	131149	126743	28.7	4.4	3.8	3.8
2001	4457579	628996	569968	150913	127627	34.9	4.9	4.5	4.5
2002	4337036	631348	583755	#N/A	128453	33.8	4.9	4.5	4.5
2003	4393893	632605	560978	#N/A	129227	34.0	4.9	4.3	4.3
2004	4718122	647541	612790	146218	129988	36.3	5.0	4.7	4.7
2005	4648401	684897	654871	131869	130756	35.6	5.2	5.0	5.0
2006	4653265	702445	670727	153724	131448	35.4	5.3	5.1	5.1
2007	4807517	724112	711144	131149	132129	36.4	5.5	5.4	5.4

2007	4807517	724112	711144	131149	132129	36.4	5.5	5.4	5.4
2008	4884960	767842	750934	159020	132802	36.8	5.8	5.7	5.7
2009	5579915	768507	749838	162675	133450	41.8	5.8	5.6	5.6
2010	5969892	779595	766394	#N/A	134091	44.5	5.8	5.7	5.7

Notes:

1. The number for recorded criminal cases by police in 2006 totalled 4744136 in China Statistical Yearbook (2008). However, China Law Yearbook (2007) and China Statistical Yearbook (2007) both documented that number as 4653265.

2. China Statistical Yearbook (2004) and China Law Yearbook (2003) both recorded the number for criminal cases filed by police in 2002 was 3637307, but the number was 4336712 according to China Statistics Yearbook (2003).
3. Police: The number of criminal cases recorded by public security organs in China
4. Courts: The number of criminal cases accepted into first trial proceedings by people's courts
5. Procuracy: The number of criminal cases Chinese procuratorates brought about charges
6. Figures labelled as N/A are missing or unknown data.

Sources:

1. The sources for criminal cases- China Law Yearbook (1987-2010) and China Statistical Yearbook (1998-2011)
2. The sources for population - China Statistical Yearbook (2011)
3. Hans-Günther Heiland, Louise I. Shelley, Hisao Katō (1992). *Crime and Control in Comparative Perspectives*. Walter de Gruyter.